



# Rapists Discover New Weapons: The Problem and Response to Drug-Facilitated Sexual Assault

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**Rapists Discover New Weapons:  
The Problem of and Response to  
Drug-Facilitated Sexual Assault**

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Between April 1993 and July 1996, two twin brothers sexually assaulted at least sixteen women in California.<sup>1</sup> The Spitzer brothers did not use physical force or guns or knives to commit the rapes; instead, they used a newer type of weapon – the powerful sedative Rohypnol – to

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<sup>1</sup>Sue McAllister, *Jury Convicts Twin Brothers in Date Rape Drugging Case*, LOS ANGELES TIMES, June 18, 1998, at B3. Although the term “sexual assault” includes more activities than the term “rape,” I use the two terms interchangeably throughout this paper for the sake of variety.

render their victims unconscious. Their victims included a flight attendant, a lawyer, a shoe salesperson, a single mother, and a college student.<sup>2</sup> The brothers followed the same plan with each victim. One of the brothers would invite a woman to go on a date with him, and would then slip the undetectable drug into her glass. Once the woman entered a hypnotic, dream-like state, the brother would rape her, often filming the act to make sexual videos.<sup>3</sup> After his arrest, Julian Spitzer's explanation for the sex tapes was that the women "were, you know, having a good time."<sup>4</sup> One of the victims described her last memory before she was raped: "I felt paralysis. I couldn't move. I couldn't lift my head."<sup>5</sup> When the victims awoke in bed with one of the brothers, they would have no memory of what had transpired.<sup>6</sup>

At approximately the same time as the Spitzer brothers were using Rohypnol to drug and rape women, two other Californian men chose a different weapon to commit similar crimes. Steven Michael Hagemann and Danny Richard Bohannon slipped the depressant gamma-hydroxybutyrate (GHB) into the drinks of at least ten women, and then raped and photographed their unconscious victims.<sup>7</sup> The pair also drugged at least six men to prevent them from protecting their female friends. Like the Spitzers, these two men claimed the sex was consensual. One of their victims reported that she had been "shattered emotionally" and financially "destroyed" because she lost her job due to emotional problems after the rape.<sup>8</sup>

As early as 1985, a man in New York had discovered yet a third drug to facilitate rape. Richard Esposito invited two women to a discotheque, and while the women danced he dropped ketamine, an animal tran-

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<sup>2</sup>Julia Scheeres, *Trial Offers Look at Date-Rape Drug*, LOS ANGELES TIMES, May 31, 1998, at B1.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>Greg Krikorian, *2 Guilty in 'Date Rape' Drug Case*, LOS ANGELES TIMES, July 4, 1997, at B1.

<sup>8</sup>Greg Krikorian, *2 Sentenced in 'Date Rape Drug' Attacks*, LOS ANGELES TIMES, Aug. 6, 1997, at B1.

quilizer, into their drinks.<sup>9</sup> He took them to a motel and raped and sodomized the drugged women.<sup>10</sup>

These three cases reveal that in the last two decades, men who wish to sexually assault women<sup>11</sup> have discovered powerful new weapons to facilitate their plans. Often referred to as “date-rape drugs,” Rohypnol, GHB, and ketamine<sup>12</sup> are used by rapists to render women unconscious, making them unable to resist unwanted sexual advances. The American Prosecutors Research Institute defines “drug-facilitated rape” as:

[s]exual assault facilitated by the offender’s use of an ‘anesthesia-type’ drug which when administered to the victim (stealthily or not) render[s] the victim ‘physically incapacitated or helpless,’ and thus incapable of giving or not giving consent. These victims are usually unconscious during their sexual assault and have anterograde amnesia upon gaining consciousness, similar to the effects of a surgery patient coming out of anesthesia.<sup>13</sup>

Drug-facilitated rape presents its victims and law enforcement personnel with an additional set of challenges above and beyond those associated with other sexual assaults. This paper will explore those challenges by examining the problem of drug-facilitated sexual assault and the response to this problem.

More specifically, Part I of this paper presents the problem of drug-facilitated sexual assault by describing three of the many drugs used in such assaults and explaining the characteristics and prevalence of drug-facilitated rape. Part II outlines the responses to the problem developed by the federal, state, and local governments as well as by private actors. Finally, Part III examines these responses and provides recommendations for additional responses to the problem of drug-facilitated sexual assault.

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<sup>9</sup> *137-Year Sentence in Queens*, N. Y. TIMES, Nov. 14, 1985, at B18.

<sup>10</sup> *Id.*

<sup>11</sup> 99 in 100 [rapists] are male... females account for a small percentage of known offenders, [and] in a very small fraction of sexual assaults, victim and offender are of the same sex. LAWRENCE A. GREENFIELD, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT iii - iv (1997). Given these facts, this paper refers to rapists as male and victims as female, although I acknowledge that these labels may not always be accurate.

<sup>12</sup> This paper focuses only on these three drugs, although many others have been used to facilitate rape, especially alcohol and marijuana. See AMERICAN PROSECUTORS RESEARCH INSTITUTE, THE PROSECUTION OF ROHYPNOL AND GHB RELATED SEXUAL ASSAULTS, Ch. 1, pp. 13 – 17 (1999) [hereinafter APRI] (describing twenty-one other drugs used to facilitate sexual assault). I have chosen this focus because these three drugs have garnered the most attention from the government, media, and medical field. Although I later argue that this narrow focus should be avoided, I found it necessary to mirror these group’s focus in order to describe most accurately the overall response to the date rape drug crisis. It should be clear from the outset of this paper, however, that my focus on Rohypnol, GHB, and ketamine in no way suggests that these three drugs are the most prevalent or dangerous drugs related to rape.

## The Problem of Drug-Facilitated Sexual Assault

### I.

This section describes three drugs – Rohypnol, GHB, and ketamine – that men use to commit drug-facilitated sexual assault. It also discusses the unique characteristics and prevalence of the crime of drug-facilitated sexual assault.

### A.

#### The Drugs

#### 1.

##### Rohypnol

Rohypnol is the brand name for flunitrazepam, which is a benzodiazepine (BZ) manufactured by the Swiss-based company Hoffman-La Roche, Inc.<sup>14</sup> BZs are generally used as sleep aids, sedatives, muscle relaxants, and to reduce seizures and produce anterograde amnesia.<sup>15</sup> Rohypnol is a legal drug in Europe, Asia, and Latin America, and during the mid-1990s was the most widely prescribed sedative in Western Europe.<sup>16</sup> Its

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<sup>14</sup>Drug Enforcement Administration, U.S. Department of Justice, *Flunitrazepam* (last modified Nov. 23, 1999) <<http://www.usdoj.gov/dea/pubs/rohypnol/rohypnol.htm>>. Flunitrazepam is also marketed under the trade name Hypnodorm, but much less frequently. Regardless of the actual manufacturer, users of flunitrazepam and the media refer to the drug as Rohypnol. This paper follows suit and also refers to flunitrazepam as Rohypnol.

<sup>15</sup>National Institute of Justice, U.S. Department of Justice, A Report to the Attorney General from the Department of Justice Drug-Facilitated Rape Working Group 12 (June 26, 1998) [hereinafter NIJ, *A Report to the Attorney General*]. When a person experiences anterograde amnesia, she does not remember the events during the time in which a drug is in effect. Retrograde amnesia, on the other hand, is a condition in which a person does not remember events prior to the intervening agent. *Id.* Other benzodiazepines include Valium, Librium, Xanax, and Halcion. Drug Enforcement Administration, U.S. Department of Justice, *DEA Briefing Book* (last modified Oct. 15, 2000) <<http://www.usdoj.gov/dea/briefingbook/page16-31.htm#rohypnol>>.

<sup>16</sup>Christine A. Saum and James A. Inciardi, *Rohypnol Misuse in the United States*, 32 *SUBSTANCE USE & MISUSE* 723, 724 (1997).

physiological effects are similar to those of Valium, although Rohypnol is approximately seven to ten times more potent.<sup>17</sup> Adverse effects of Rohypnol use include decreased blood pressure, memory impairment, drowsiness, visual disturbances, dizziness, confusion, gastrointestinal disturbances, and urinary retention.<sup>18</sup> High doses of Rohypnol may create respiratory depression, and chronic use may result in dependence and withdrawal symptoms if use is discontinued.<sup>19</sup> When mixed with alcohol and/or other drugs, Rohypnol may cause death due to cardiovascular collapse or enhanced nervous system depression.<sup>20</sup> The drug's most important features for the purposes of this paper are that, like other BZs, it produces muscle relaxation and anterograde amnesia. The sedative effects of Rohypnol normally begin to occur within thirty minutes after ingesting the drug, peak within two hours, and may continue for eight hours or more.<sup>21</sup> Rohypnol is sold in tablet form, and normally ingested as a pill, although some users grind the pills into a powder and snort the drug.<sup>22</sup>

Many street names exist for Rohypnol, including Roofies, Rophies, Roche, Forget-Me-Pill, Mexican Valium, R-2, Rib, Rope, and Roaches.<sup>23</sup> Rohypnol is considered a "club drug," meaning it is commonly used at nightclubs and raves.<sup>24</sup> Several different groups of people use Rohypnol. In the more than seventy countries

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<sup>17</sup>Drug Enforcement Administration, *DEA Briefing Book*, *supra* note 15.

<sup>18</sup>Drug Enforcement Administration, *Flunitrazepam*, *supra* note 14. *See also* Saum and Inciardi, *supra* note 16, at 725; Sarah R. Calhoun et al., *Abuse of Flunitrazepam (Rohypnol) and Other Benzodiazepines in Austin and South Texas*, 28 J. PSYCHOACTIVE DRUGS 183, 187 (1996).

<sup>19</sup>Drug Enforcement Administration, *DEA Briefing Book*, *supra* note 15. Withdrawal symptoms may include muscle pain, extreme anxiety, confusion, numbness, loss of identity, hallucinations, convulsions, shock, and cardiovascular collapse. Drug Enforcement Administration, *Flunitrazepam*, *supra* note 14.

<sup>20</sup>Saum and Inciardi, *supra* note 16, at 726.

<sup>21</sup>Drug Enforcement Administration, *Flunitrazepam*, *supra* note 14.

<sup>22</sup>Office of National Drug Control Policy, *Facts & Figures: Club Drugs* (visited Mar. 25, 2001) <<http://www.whitehousedrugpolicy.gov/drugfact/club/index.html>>.

<sup>23</sup>*Id.*

<sup>24</sup>*See* Drug Enforcement Administration, U.S. Department of Justice, *An Overview of Club Drugs*, DRUG INTELLIGENCE BRIEF 1 (Feb. 2000); *see also* National Institute on Drug Abuse, Department of Health and Human Services, *Club Drugs Home* (visited March 25, 2001) <<http://www.clubdrugs.org>>. One detective describes a rave as "basically a dance party.... Very loud music, mostly techno, lot of synthesizers, a lot of bass, colored lights, flashing lights, strobe lights. They originally started out as spontaneous parties.... Right now the Rave is very commercialized.... They [are] all night parties, which, as far as we are concerned at the Orlando Police Department, exist to get the drugs out." *Controlled and Uncontrolled Substances Used to Commit Rape: Hearing Before the Subcomm. on Crime of the Comm. on the Judiciary on H.R. 1530*, 105<sup>th</sup> Cong. 42 (1998) (testimony of Det. Michael Stevens, Orlando Police Dept.).



where Rohypnol is legal, doctors prescribe it and patients ingest it for legitimate medical purposes.<sup>25</sup> In those countries as well as the United States (U.S.), adolescents and young adults ingest the drug as an intoxicant. This group reports that the desirable effects of Rohypnol include a “slowed-down, relaxed feeling similar to being drunk on alcohol,”<sup>26</sup> the enhancement of the effects of marijuana and alcohol,<sup>27</sup> the ability to be more talkative and comfortable in social situations,<sup>28</sup> and an increased feeling of power and self-esteem.<sup>29</sup> Heroin, cocaine, and ecstasy users also take Rohypnol, reportedly to relieve withdrawal symptoms<sup>30</sup> and as “landing gear” to make the transition from intoxication to sobriety less difficult.<sup>31</sup> Finally, rapists use Rohypnol to incapacitate their victims, as discussed below.<sup>32</sup>

Rohypnol first appeared in the U.S. in the early 1990s, and emerged as a drug of abuse in 1993.<sup>33</sup> By 1995, the National Institute on Drug Abuse’s (NIDA) Community Epidemiology Work Group (CEWG) reported that Rohypnol was one of the fastest growing drug problems in Texas and South Florida, and that Rohypnol misuse was quickly spreading to other parts of the country.<sup>34</sup> Several factors may explain the drug’s rise

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<sup>25</sup>APRI, *supra* note 12.

<sup>26</sup>Calhoun, *supra* note 18, at 187.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*; Anna Maria Daderman and Lars Lidberg, *Flunitrazepam (Rohypnol) Abuse in Combination with Alcohol Causes Premeditated, Grievous Violence in Male Juvenile Offenders*, 27 J. AM. ACAD. PSYCHIATRY L. 83, 90 (1999).

<sup>29</sup>Daderman and Lidberg, *supra* note 28, at 90.

<sup>30</sup>Saum and Inciardi, *supra* note 16, at 727; *see also* James H. Woods and Gail Winger, *Abuse Liability of Flunitrazepam*, 17 J. CLINICAL PSYCHOPHARMACOLOGY 1S, 48S – 49S (Supp. 2 1997).

<sup>31</sup>*Controlled and Uncontrolled Substances Used to Commit Date Rape* (testimony of Det. Michael Stevens), *supra* note 24, at 30.

<sup>32</sup>*See infra* Section I.B.

<sup>33</sup>Drug Enforcement Agency, Department of Justice, Flunitrazepam, available in APRI, *supra* note 12, at Ch. 1. Also contributing to the drug’s popularity may have been its link to Nirvana lead signer Kurt Cobain, who in February 1994, overdosed on Rohypnol in what is believed to be a suicide attempt. SENATE COMM. ON THE JUDICIARY (SEN. JOSEPH R. BIDEN, JR.), 103<sup>rd</sup> CONG., FACING THE FUTURE - THE RISE OF TEEN DRUG ABUSE AND TEEN VIOLENCE 59 (Comm. Print 1995).

<sup>34</sup>Community Epidemiology Work Group, National Institute on Drug Abuse, Epidemiological Trends in Drug Abuse: Advance Report (1995). In Florida, between 1992 and 1995, the number of law enforcement cases involving Rohypnol increased by 3,000 percent. *See New International Threat of “Date-Rape Drug” Trafficking: Hearing Before the Senate Subcomm. on Western Hemisphere and Peace Corps Affairs of the Comm. on Foreign Relations*, 104<sup>th</sup> Cong. 16 (1996) (testimony of Terrance W. Woodworth, Drug Enforcement Agency).

in popularity among younger people: (1) they believed it was safe because it was sold in presealed bubble packs;<sup>35</sup> (2) they thought it could not be detected by urinalysis;<sup>36</sup> and (3) they were attracted by its low price – averaging about three dollars per tablet in the mid-1990s.<sup>37</sup>

Rohypnol was widely available in the mid-1990s. Before March 1996, individuals with a valid prescription could bring a ninety-day supply of Rohypnol across U.S. borders.<sup>38</sup> A study revealed that in the one-year period from June 1994 to June 1995, Rohypnol was the second most commonly declared prescription drug at one Mexican border checkpoint, appearing on approximately forty-three percent of the declarations.<sup>39</sup> By July 1995, almost 1,300 cases of Rohypnol possession were under investigation,<sup>40</sup> and in 1995 the federal government (mostly Customs officials) seized approximately 225,000 tablets.<sup>41</sup> A survey of Dade County, Florida high school students revealed that 11% reported ever using Rohypnol, while a survey of one hundred one Texas school districts found Rohypnol use in eighty-eight of the districts, with an average of 3.4% of students in each district having ever used the drug.<sup>42</sup> Fourteen percent of students in a district on the Texas-Mexico border reported ever using Rohypnol.<sup>43</sup> NIDA's Monitoring the Future (MTF) national survey revealed that in 1998, 5% of eighth graders and 1% of tenth and twelfth graders reported using Rohypnol.<sup>44</sup>

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<sup>35</sup>Drug Enforcement Administration, *Flunitrazepam*, *supra* note 14.

<sup>36</sup>*Id.*

<sup>37</sup>See Saum and Inciardi, *supra* note 16, at 724; Douglas Herring, *Getting High from South of the Border: Illicit Smuggling of Rohypnol as an Example of the Need to Modify U.S. Response to International Drug Smuggling After NAFTA*, 18 LOY. L.A. INT'L & COMP. L.J. 841, 842 – 43 (1996) (quoting a drug treatment expert as stating Rohypnol “will be as popular as crack because it is so cheap”).

<sup>38</sup>Saum and Inciardi, *supra* note 16, at 724.

<sup>39</sup>*Trade & Government Memos*, F-D-C REP. (“The Pink Sheet”), Apr. 11, 1996, at 16. The study also found that during a three-week period in 1995, travelers declared over 100,000 tablets of Rohypnol at one border checkpoint. E. Floyd Phelps, *Ravages of Rohypnol*, SECURITY MANAGEMENT, Nov. 1996, at 14.

<sup>40</sup>FACING THE FUTURE, *supra* note 33, at app. B.

<sup>41</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 25.

<sup>42</sup>*Id.* at 27 - 28.

<sup>43</sup>*Id.* at 28.

<sup>44</sup>Nora Fitzgerald and K. Jack Riley, *Drug-Facilitated Rape: Looking for the Missing Pieces*, NAT'L. INST. JUST. J., Apr. 2000, at 10.

## 2.

### GHB

GHB is a drug that appears naturally in minute amounts in the human body, and was first synthesized in the 1920s.<sup>45</sup> It is a white powder that is easily formed by adding sodium hydroxide solution to gamma-butyrolactone (GBL), and is usually available as a odorless, colorless liquid.<sup>46</sup> Effects of ingesting GHB, which substantially increase when combined with the consumption of alcohol, include drowsiness, disorientation, dizziness, slurred speech, nausea, difficulty moving, and reduced heart rate and blood pressure.<sup>47</sup> At higher doses, coma and death may occur.<sup>48</sup> While Rohypnol produces anterograde amnesia and muscle relaxation, GHB induces disinhibition, and increases sensuality, euphoria, and relaxation.<sup>49</sup> Symptoms normally appear within fifteen to thirty minutes of ingesting the drug.<sup>50</sup>

Like Rohypnol, GHB is known on the street by many different names, including Liquid Ecstasy or Liquid X, Grievous Bodily Harm, Easy Lay, Georgia Home Boy, and Goop.<sup>51</sup> And like Rohypnol, GHB has been and is currently used for several different purposes. In the late 1950s and early 1960s, a U.S. pharmaceutical company worked on developing GHB as an anesthetic agent, but later stopped development.<sup>52</sup> Beginning in the 1970s and continuing today, researchers have studied GHB as a possible treatment for sleep disorders.<sup>53</sup>

In Europe, GHB is used as an anesthetic, but with decreasing frequency as seizure-like activity became as-

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<sup>45</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 14.

<sup>46</sup>Kelly M. Smith, *Drugs Used in Acquaintance Rape*, 39 J. AM. PHARMACEUTICAL ASS'N. 519, 520 (1999).

<sup>47</sup>See Smith, *supra* note 46, at 521; APRI, *supra* note 12, at 8; Drug Enforcement Administration, *An Overview of Club Drugs*, *supra* note 23, at 3.

<sup>48</sup>APRI, *supra* note 12, at 8; Drug Enforcement Administration, *An Overview of Club Drugs*, *supra* note 24, at 3.

<sup>49</sup>Michael Welner and Elizabeth Delfs, *Rapist in a Glass? The Big Picture of The Rohypnol Wars*, 1 THE FORENSIC ECHO 4, 9 (1997). Describing the effects of GHB in less medical terms, one prosecutor notes, "This drug is the closest thing to authentic Spanish fly that I can think of. GHB can remove the impulse control that stops a woman from having sex with a stranger." Mary K. Moore and Leah Ginsberg, *The Date Rapist's Scary New Weapon*, COSMOPOLITAN, Feb. 1, 1999, at 202, quoting Bob Nichols, Broward County Assistant State Attorney.

<sup>50</sup>Smith, *supra* note 46, at 521.

<sup>51</sup>Drug Enforcement Administration, *An Overview of Club Drugs*, *supra* note 24, at 3.

<sup>52</sup>*Id.*

<sup>53</sup>Smith, *supra* note 46, at 520. This use of GHB will be discussed in more detail *infra*.

sociated with it.<sup>54</sup> It has also been used with mixed results in Europe to treat alcohol and heroin addiction and withdrawal.<sup>55</sup> In 1977, one study hypothesized that GHB stimulated the effects of growth hormones; this link, however, has never been proven. Nonetheless, bodybuilders used GHB in the 1980s for its assumed steroid-enhancing effects, and they could purchase the drug over-the-counter at health food stores.<sup>56</sup> Between June 4 and November 28, 1990, the Food and Drug Administration (FDA) received reports of at least fifty-seven cases of illness due to GHB ingestion, with most patients requiring emergency room care.<sup>57</sup> After receiving these reports, in November 1990, the FDA banned the drug from being sold in the U.S. and warned consumers that GHB use was unsafe and must stop unless used within an FDA-approved clinical trial.<sup>58</sup> Despite this ban, in the 1990s GHB became popular among adolescents and young adults as an illicit recreational drug used for the euphoria and intoxication it produces, and as a drug to facilitate rape.<sup>59</sup> Unsubstantiated rumors linking actor River Phoenix's death in 1993 to GHB are believed to have generated interest in the drug by recreational users.<sup>60</sup> It is an easy drug to manufacture, composed of inexpensive and readily available ingredients, and in the 1990s many recipes for making GHB on a kitchen stove could be found on the Internet.<sup>61</sup> Those who manufacture GHB can make substantial profits, as an initial investment

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<sup>54</sup>*Id.*

<sup>55</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 14.

<sup>56</sup>*Id.*

<sup>57</sup>*Epidemiologic Notes and Reports Multistate Outbreak of Poisonings Associated with Illicit Use of Gamma Hydroxy Butyrate*, 39 MMWR WEEKLY 861 (1990).

<sup>58</sup>Food and Drug Administration, GHB Warning (Press Release), Nov. 8, 1990, available at <<http://www.fda.gov/bbs/topics/news/new00032.html>> (visited Mar. 27, 2001); *see also* NIJ, *A Report to the Attorney General*, *supra* note 15, at 14.

<sup>59</sup>*See Controlled and Uncontrolled Substances Used to Commit Date Rape* (prepared statement of John J. King, Drug Enforcement Agency), *supra* note 24, at 53 (stating that three major groups abuse GHB: teenagers and young adults who take it as an intoxicant or hallucinogenic; bodybuilders who take it as an anabolic agent or sleep aid; and people who use it to commit sexual assault); NIJ, *A Report to the Attorney General*, *supra* note 15, at 14; Drug Enforcement Administration, Department of Justice, DEA Press Release Fact Sheet: Gamma Hydroxybutyric Acid, Mar. 13, 2000, available at <<http://www.usdoj.gov/dea/pubs/pressrel/pr031300-01.htm>> (visited Mar. 27, 2001).

<sup>60</sup>Smith, *supra* note 46, at 520.

<sup>61</sup>*See* NIJ, *A Report to the Attorney General*, *supra* note 15, at 15; Drug Enforcement Administration, DEA Press Release Fact Sheet, *supra* note 59. I conducted my own search on the Internet for recipes for GHB, and easily found some. *See, e.g., Synthesis for Liquid GHB* (visited Jan. 15, 2001) <<http://shovelcat.com/ghb.info/recipe.html>>. GHB differs from Rohypnol in that it is primarily manufactured in illegal laboratories with little concern for proportions or cleanliness, while Rohypnol is almost exclusively manufactured in quality controlled, legitimate laboratories. *See* Trinka Porrata, *Gamma Hydroxy Butyrate: Old Drug -New Tricks*, reprinted in *Controlled and Uncontrolled Substances Used to Commit Date Rape*, *supra* note 24, at 36.

of \$800 has an approximate street value of \$92,000.<sup>62</sup> The drug is often sold for approximately \$10 at raves by the drop, capful, or “swig,” and mixed into spring water bottles or disguised as mouthwash.<sup>63</sup>

Between 1990 and March 2000, the Drug Enforcement Administration (DEA) documented over 7,100 overdoses and law enforcement encounters involving GHB in forty-five states.<sup>64</sup> Between 1995 and March 2000, DEA documented sixty-three deaths related to GHB.<sup>65</sup> A study by the Drug Abuse Warning Network (DAWN) of selected emergency departments found that GHB mentions had risen from 55 in 1994, to 1,282 in 1998, to 2,973 in 1999.<sup>66</sup>

Closely related to GHB are GBL and 1,4-butanediol (BD). GBL and BD are industrial solvents, often used in floor stripper and paint thinner, that are converted into GHB after human consumption.<sup>67</sup> Both have been marketed as dietary supplements under the names Revivarant, RenewTrient, and Blue Nitro Vitality, which claimed to promote sleep, release growth hormones, enhance sexual and athletic performance, and relieve depression.<sup>68</sup> When the FDA banned the sale and use of GHB, many manufacturers and users switched to

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<sup>62</sup>Ted O’Connell et al., *Gamma-Hydroxybutyrate GHB: A Newer Drug of Abuse*, 62 AMERICAN FAMILY PHYSICIAN 2478 (Dec. 1, 2000).

<sup>63</sup>Drug Enforcement Administration, DEA Press Release Fact Sheet, *supra* note 59. See also Community Epidemiology Work Group, National Institute on Drug Abuse, Epidemiological Trends in Drug Abuse: Advance Report (2000), available at <<http://www.nida.nih.gov/CEWG/AdvancedRep/6.20ADV/0600adv.html>> (visited Mar. 27, 2001).

<sup>64</sup>Drug Enforcement Administration, DEA Press Release Fact Sheet, *supra* note 59. This figure includes federal, state, and local cases of possession, trafficking, clandestine manufacturing, and forensic analyses. *Id.* One study found sixty-nine cases of acute poisoning and one death attributed to GHB during a one-year time period in New York and Texas. *Gamma Hydroxy Butyrate Use: New York and Texas, 1995-1996*, 46 MMWR WEEKLY 281 (1997).

<sup>65</sup>*Id.*

<sup>66</sup>Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *Club Drugs*, THE D.A.W.N. REPORT, Dec. 2000, at 3, available at <<http://www.samhsa.gov/oas/clubdrug.pdf>> (visited Mar. 27, 2001). It is important to note that DAWN’s figures do not include any cases in which drugs are given to others without their knowledge. See *id.* at 10. Despite these statistics, a few commentators and doctors continue to claim that GHB is a perfectly safe dietary supplement. See, e.g., WARD DEAN ET AL., GHB: THE NATURAL MOOD ENHANCER (1997); Joshua H. Beisler, *Dietary Supplements and Their Discontents: FDA Regulation and the Dietary Supplement Health and Education Act of 1994*, 31 RUTGERS L. J. 511 (2000). These commentators contend that “GHB may be the safest, most effective substance ever developed” for a variety of purposes, and that the FDA and DEA have manufactured a “GHB-poisoning/date-rape crisis. DEAN, at back cover. One argues that “[t]he scientific evidence not only fails to substantiate [allegations that GHB causes comas and seizures], but bluntly contradicts them as well.” Beisler, at 541. These statements about GHB’s safety are simply untrue, as articles in such highly respected medical journals as the New England Journal of Medicine demonstrate. See, e.g., Deborah L. Zvosec et al., *Adverse Events, Including Death, Associated with the Use of 1,4-Butanediol*, 344 NEW ENG. J. MED. 87 (2001).

<sup>67</sup>Zvosec, *supra* note 66.

<sup>68</sup>See *Adverse Events Associated with Ingestion of Gamma-Butyrolactone Minnesota, New Mexico, and Texas, 1998-1999*, 48 MMWR WEEKLY 137 (1999); Zvosec, *supra* note 66.

GBL and BD.<sup>69</sup> These chemicals, once converted to GHB, have similar adverse effects, and researchers have documented poisonings and deaths after consumption of these chemicals as well.<sup>70</sup>

The above information on GHB does not paint a pretty picture, yet some people regard GHB as their savior.<sup>71</sup> As mentioned above, beginning in the 1970s, researchers have studied GHB as a potential treatment for the disease of narcolepsy.<sup>72</sup> In 1994, at the urging of the FDA's Office of Orphan Products, Orphan Medical began developing GHB as a narcolepsy treatment, under the name Xyrem.<sup>73</sup> In March 1998, it received the results of a two-year clinical study, which showed that Xyrem reduced sudden sleep attacks and left many patients feeling less sleepy during the day.<sup>74</sup> Sharon Fitzgerald, a fifty-six year old judge who participated in the Xyrem clinicals, described the effects of Xyrem: "My sleep was better. There were no more horrible dreams. I could practice law, and play with my grandkids. It is a miracle drug."<sup>75</sup> GHB thus poses both great benefits and harms to different groups of people.

### 3.

#### Ketamine

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<sup>69</sup>Zvosec, *supra* note 66.

<sup>70</sup>See *Adverse Events*, *supra* note 68 (describing seven cases of GBL toxicity and summarizing an additional thirty-four cases of GBL toxicity); Zvosec, *supra* note 66 (describing eight patients who had ingested BD and concluding that the health risks of BD are similar to those of GHB and GBL, including acute toxic effects, death, addiction, and withdrawal).

<sup>71</sup>Mitchell Zuckoff, *Its Use as Narcolepsy Treatment Splits Agencies on 'Date-Rape' Drug*, BOSTON GLOBE, Apr. 20, 1999, at A1.

<sup>72</sup>The pharmaceutical company currently developing GHB describes narcolepsy as follows:

Narcolepsy patients experience profound sleepiness in the daytime – so severe that they often find it difficult to drive, hold a job or perform other seemingly 'normal' tasks. In addition to excessive daytime sleepiness, some narcoleptic patients also experience cataplexy, which is a sudden loss of muscle control which may cause the patient to collapse. Some patients find themselves virtually unable to function as they may collapse from 25-50 times in one day.

*Controlled and Uncontrolled Substances Used to Commit Date Rape* (letter from Orphan Medical, Inc.), *supra* note 24, at 63. Orphan Medical, Inc., was formed in 1994 solely to develop and commercialize treatments for rare diseases. *Id.* at 64. Narcolepsy affects approximately 180,000 Americans, making the market too small for most pharmaceutical firms to find it worthwhile to develop a treatment. Jill P. Barshay, *One Drug Two Faces*, STAR TRIBUNE (Minneapolis), Aug. 6, 2000, at 1D.

<sup>73</sup>See *Controlled and Uncontrolled Substances* (letter from Orphan Medical, Inc.), *supra* note 24, at 64; Barshay, *supra* note 72.

<sup>74</sup>Barshay, *supra* note 72.

<sup>75</sup>Ellen Licking, *Jekyll and Hyde Drug*, BUSINESS WEEK, Oct. 23, 2000, at 96.

Ketamine hydrochloride (ketamine), a chemical cousin of phencyclidine (PCP), is a dissociative anesthetic.<sup>76</sup> It was developed in the 1960s and is used in the U.S. as a general anesthetic in emergency and veterinary medicine.<sup>77</sup> It is marketed for human use under the trade name Ketalar, and for veterinary use under names including Ketaset, Ketaget, and Vetalar.<sup>78</sup> Side effects produced by the drug include a feeling described as floating above one's own body, hypertension, vomiting, dizziness, disorientation, vivid dreams, hallucinations, delirium, anxiety, insomnia and amnesia.<sup>79</sup> Symptoms begin within fifteen to twenty minutes of taking the drug.<sup>80</sup>

Ketamine is known on the street as K, Special K, Vitamin K and Cat Valium.<sup>81</sup> Ketamine first became popular on the streets in the early 1970s, in part due to John Lilly's enthusiastic description of his experimentation with what he called Vitamin K.<sup>82</sup> Recreational drug users enjoyed ketamine's PCP-like effects, with the addition of the visual effects of lysergic acid diethylamide (LSD), and the fact that the experience lasts an hour or less as compared to PCP's several hours.<sup>83</sup> Ketamine use experienced a resurgence in the 1990s as the rave scene developed.<sup>84</sup> The DEA describes two ketamine experiences: "Low doses of the drug produce an experience referred to as 'K-Land,' a mellow, colorful 'wonder world.' Higher doses produce an

<sup>76</sup>James W. Dotson et al., *Ketamine Abuse*, 25 J. DRUG ISSUES 751 (1995). Dissociative drugs are those that distort perceptions of sight and sound and produce feelings of detachment from one's environment and self. National Institute on Drug Abuse, *Hallucinogens and Dissociative Drugs*, RESEARCH REPORT SERIES, March 2001, available at <<http://www.nida.nih.gov/ResearchReports/hallucinogens/hallucinogens.html>> (visited Apr. 15, 2001).

<sup>77</sup>Dotson, *supra* note 76, at 752; Smith, *supra* note 46, at 523.

<sup>78</sup>Scheduled of Controlled Substances: Placement of Ketamine into Schedule III, 64 Fed. Reg. 37,673 (1999) (to be codified at 21 C.F.R. pt. 1308).

<sup>79</sup>Dotson, *supra* note 76, at 753; Smith, *supra* note 46, at 523 – 24.

<sup>80</sup>Smith, *supra* note 46, at 521.

<sup>81</sup>Drug Enforcement Agency, *An Overview of Club Drugs*, *supra* note 24, at 3.

<sup>82</sup>Dotson, *supra* note 76, at 753. Lilly, the first neuroscientist to communicate with dolphins, wrote the book "The Scientist: A novel autobiography" in 1978, and was a character in the 1980 movie "Altered States." *Id.* at 756; John Cloud, *Is Your Kid on K? A Hot New High Hits Main Street, and, Nope, It Isn't a Breakfast Cereal*, TIME, Oct. 20, 1997, at 90. Timothy Leary, a friend of Lilly's deemed the "acid guru," also promoted the use of ketamine in the 1970s. *Id.* at 754.

<sup>83</sup>See Drug Enforcement Agency, *An Overview of Club Drugs*, *supra* note 24, at 3; Drug Enforcement Agency, Department of Justice, DEA Press Release: DEA to Control 'Special K' for the First Time, July 13, 1999, available at <<http://www.dea.gov/pubs/pressrel/pr071399.htm>> (visited Mar. 27, 2001). Although the "trip" lasts only up to an hour, the user's senses, judgment and coordination can be affected for eighteen to twenty-four hours. Office of National Drug Control Policy, *Facts & Figures: Club Drugs*, *supra* note 22. One author describes ketamine as prompting existential thoughts, giving it a spiritual dimension. Alex Bellos, *The Animal Magic Trap*, GUARDIAN (London), Apr. 1, 1997, at T8.

<sup>84</sup>Dotson, *supra* note 76, at 754. Its growing popularity was perhaps partially sparked by, and reflected in, an "X-Files" episode in which agent Fox Mulder took ketamine to recover lost memories and a song by the Chemical Brothers titled "Lost in the K-Hole." See Cloud, *supra* note 82.

effect referred to as ‘K-Hole,’ an ‘out of body,’ or ‘near-death’ experience.”<sup>85</sup> Ketamine has also been linked to drug-facilitated rape.<sup>86</sup> The drug is available legally only in liquid form by prescription, but can easily be converted to powdered form. When used illicitly, ketamine is injected, smoked, snorted, swallowed, or placed in drinks.<sup>87</sup> Each dose costs on average \$20.00.<sup>88</sup> Robberies of veterinary clinics are the primary source of illicit ketamine.<sup>89</sup>

Between 1992 and July 1999, the DEA learned of over 500 reports of the sale and/or use of ketamine in schools, college campuses, night clubs and raves.<sup>90</sup> DAWN’s study of selected emergency departments found 1,173 mentions of ketamine use, with an increase from 19 mentions in 1994 to 396 in 1999. <sup>91</sup> DAWN’s study of selected medical examiners found 46 deaths associated with the drug.<sup>92</sup>

## B.

### Drug-Facilitated Sexual Assault

#### 1. The Problem

Each of the drugs described above has been used to facilitate rape.<sup>93</sup> In the typical case, a woman is at a restaurant, rave, party, or club, when a man secretly slips a drug into her drink. As she drinks it, she begins to feel disoriented and sick. The next thing she remembers is waking up, with unexplained gaps in her

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<sup>85</sup>Drug Enforcement Agency, *An Overview of Club Drugs*, *supra* note 24, at 3.

<sup>86</sup>Smith, *supra* note 46, at 523.

<sup>87</sup>Drug Enforcement Agency, *An Overview of Club Drugs*, *supra* note 24, at 3; Smith, *supra* note 46, at 523.

<sup>88</sup>Drug Enforcement Agency, *An Overview of Club Drugs*, *supra* note 24, at 3.

<sup>89</sup>Drug Enforcement Agency, DEA Press Release: DEA to Control “Special K” for the First Time, *supra* note 83. *See also* Lois R. Shea, *Drug Thieves Hit Veterinarians: Anesthetic’s Popularity Makes Clinics Targets*, BOSTON GLOBE, Dec. 19, 1999, at B16; Katie Merx, *Thieves Steal Date-Rape Drug: Special K, an Animal Anesthetic, is Latest Used in Sex Assaults*, DETROIT NEWS, Apr. 26, 1999, at C5.

<sup>90</sup>Drug Enforcement Agency, DEA Press Release: DEA to Control “Special K” for the First Time, *supra* note 83.

<sup>91</sup>*See* Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *Club Drugs*, *supra* note 66, at 3.

<sup>92</sup>*Id.* at 1.

<sup>93</sup>*See* Smith, *supra* note 46.



memory, often with signs of physical trauma or sexual activity.<sup>94</sup> Drugs facilitate sexual assault by making it easy for perpetrators to gain control of their incapacitated victims, because they do not have to overcome any form of resistance or worry about their victims calling out for help. Rapists prevent their victims from detecting threats to their safety by using an invisible weapon that is hidden in a drink, a weapon that prevents women from exercising any form of self-defense. Furthermore, rapists may appear to be rescuing their victims, who seem drunk to observers who watch the rapists carry or lead their victims out of the party or bar.

Drug-facilitated rapes differ from other forms of rape in several ways. They are most likely reported less often than other types of rape because the effects of the drugs may prevent victims from going to a hospital or police station until several hours or days have passed, the victims may be confused or uncertain about what happened, and may be reluctant to accuse someone without memory of the rape. When victims do report drug-facilitated rapes, they often encounter police and prosecutor suspicion, disbelief, or frustration, as they are unable to give a clear description of the rape. This inability to recall information that could help the investigation may add to the victims' sense of helplessness. Some people minimize drug-facilitated rape victims' trauma, mistakenly believing that a victim is better off not remembering the rape. While rape is deeply traumatic for all victims, drug-facilitated rape victims' must deal with an additional extreme form of powerlessness that stems from their inability to remember the assault; they must experience the horror and humiliation of not knowing what happened to them.<sup>95</sup> Finally, drugging is a unique form of trauma, one

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<sup>94</sup>See Fitzgerald and Riley, *supra* note 44, at 9; Deirdre Anglin et al., *Flunitrazepam and Its Involvement in Date or Acquaintance Rape*, 4 ACAD. EMERGENCY MED. 323, 324 (1996); Gail Abarbanel, *Learning From Victims*, NAT'L. INST. JUST. J. , Apr. 2000, at 11. Gail Abarbanel is the director of the Rape Treatment Center at Santa Monica – UCLA Medical Center. The remainder of this paragraph and the next summarize Ms. Abarbanel's insights on what has been learned from victims of drug-facilitated rape. See Abarbanel, at 11 – 12.

<sup>95</sup>Bonnie Campbell, Director of Department of Justice's Violence Against Women Office, explains: "Sexual assaults involving rape drugs can be doubly devastating to victims. Not only do these women live with the physical effects of these drugs, they must also face the daily mental torment of not knowing what happened to them while they were drugged." *Justice Department Develops New Tools to Fight Drug-Facilitated Sexual Assault*, PR NEWswire, May 18, 1999. Senator Joseph Biden has hypothesized: "It must be the most intolerable circumstance a person could be in – to be abused like that, know who abused

that some victims describe as “mind rape,” and should be recognized as a distinct act of victimization.

The above description of drug-facilitated rape cannot fully convey the true horror of the crime. Testimony to a Congressional subcommittee by victims of Rohypnol-related rapes paints a more detailed picture:

Real briefly, I was out at a local nightclub. I was newly separated from my husband. A girl introduced me to the rapist and he slipped [Rohypnol] in my drink. Within a matter of minutes – I was still sitting on the stool – I was completely out.

I don’t know how we got back to my house or how any of the events unfolded except that I did come to for a good 45 seconds to a minute while he was raping me.

When I came to the next morning, I still was totally disoriented. All I knew was I had to get to my job. I didn’t know what happened. It took a good 2 days for me to come out of it....

The way it ruined my life, I was living in a mobile home that I had bought for me and my three children. After the rape had occurred and I finally had put two and two together and, you know, made my police report, and things started to come together, I could not stand being in the home. I ended up selling it 3 months ago for a mere \$1,000 to get out, just to get out.

I would have night terrors of him burning my home down at night with me and my three children in it. I had horrible nightmares. I’ve been in therapy now since it happened. I spend \$100 a week just on therapy, not to mention what I spend on the medication for depression. I have not been able to keep a job. I get a job and I just can’t really function. And I have a 17 year background in retail management.

It has just completely destroyed my life, the way people have acted – like, did you do something wrong, you know, or what were you doing?

This guy knew he was going to drug and rape a woman ahead of time.... I have no way of knowing how much he gave me. I have no way of knowing if he acted alone or if there were other people in my home. I have no way of knowing if he took movies or pictures. Thank god my children were not at home.

I’ve been through feeling shame, through being scared, through being angry. I’ve worked very hard this past year on speaking out against it. At first, I was in the shadow. Then I realized that I cannot make a statement to other women to not be a victim if I’m hiding behind a curtain. OK, that makes me look like I’ve done something wrong, and I haven’t. I have not done anything wrong. I just went out to get a bite to eat and have a nightcap with my girlfriend.

At that time, I was on medication. Now this guy didn’t know this. I could have ended up in a coma. I have three small children to take care of. Then they had to deal with the depression that I went through afterward....

One big question I want to raise is if this man had AIDS, I’d probably be sitting here with 4 years left to my life right now when I’ve got babies at home.<sup>96</sup>

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you, but you cannot recall enough specifics to be able to make that person pay.” See *New International Threat of “Date-Rape Drug” Trafficking* (statement of Senator Joseph R. Biden, Jr.), *supra* note 34, at 8. This horror of not remembering stands in sharp contrast to the feeling experienced by other rape victims of being unable to forget the rape. For these victims, the trauma is reexperienced repeatedly through thoughts, flashbacks, and nightmares. Abarbanel, *supra* note 94, at 12.

Another victim of the same rapist testified:

For me it was a little bit different. I was in a friend's home and this was someone that I trusted. He offered me a coke and I drank it. Fifteen minutes after I drank the coke I started to feel dizzy. So I asked if I could lie down on the couch. I did. And that's all I remember.

I woke up the next morning in his bed without my clothes and he made the comment to me that he had waited 5 years for this. So this was not something that just happened. This was planned.

I feel that Rohypnol is a weapon. I don't see it as having any use at all, any use at all, whatsoever. It's a weapon and anybody can get hold of it. You can't go back and replace the time that I've lost, the pain that I've been through.

Lisa brought up the point about diseases. There's also pregnancy. I became pregnant as a result of this. I had to go through that also.<sup>97</sup>

## 2. Its Prevalence

Estimates of the prevalence of all types of sexual assault vary. One longitudinal survey found that 13% of the adult women surveyed reported having been raped once, which leads to an estimate of approximately 693,000 adult women being forcibly raped each year.<sup>98</sup> Another study, the National Crime Victimization Study, found that a nationally representative sample of households disclosed 430,000 sexual assaults in 1994.<sup>99</sup> Yet another researcher estimated that 25% of American women will be raped during their lifetimes.<sup>100</sup> A great majority of rapes, perhaps as many as 90%, will not be reported.<sup>101</sup> Women often do not report rapes because they are scared of retaliation by their rapists, embarrassed, blaming themselves, in fear of the way the medical and legal system will treat them, or hopeless about a just outcome.<sup>102</sup> An estimated 80% of all rapes are "date" or acquaintance rapes.<sup>103</sup>

Not surprisingly, a report by the Department of Justice Drug-Facilitated Rape Working Group found that

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<sup>98</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 9. The National Victim Center and the National Crime Victims' Research and Treatment Center conducted this study. *Id.*

<sup>99</sup>*Id.* at 10.

<sup>100</sup>Smith, *supra* note 46, citing I.L. Schwartz, *Sexual Violence Against Women: Prevalence, Consequences, Societal Factors, and Prevention*, 7 AM. J. PREVENTATIVE MED. 363 (1991).

<sup>101</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 10.

<sup>102</sup>*See id.* The choice not to report due to fears of medical treatment appear to be well-founded. In 1997, the American Medical Association gave the United States a D- for its evaluation and treatment of rape victims. *See* Laura Slaughter, *Involvement of Drugs in Sexual Assault*, 45 J. REPROD. MED. 425 (2000).

<sup>103</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 10.

it is impossible to know how many drug-facilitated rapes have occurred in the U.S.<sup>104</sup> Statistics do not exist for this crime. The report concluded:

Despite the relatively small number of cases where forensic evidence has been found to link a rape with one of these drugs, rape crisis centers and law enforcement agency personnel tell of growing numbers of cases where women believe that they have been drugged and raped. It is not possible to estimate the number of incidents that have occurred. Information gathered for this report suggests that its magnitude is small. This issue, however, is very serious and warrants attention.<sup>105</sup>

Despite the lack of statistical data, some unscientific pieces of information do indicate that drug-facilitated rape is occurring. A FDA magazine reported that in response to a *Glamour* magazine survey, nineteen percent of female college students said they knew someone who had been raped after ingesting GHB.<sup>106</sup> NIDA's CEWG reported that in 1998, GHB was used in an increasing amount of rape cases in Los Angeles and Seattle.<sup>107</sup> The Director of the Florida Poison Control Center testified in front of Florida's legislature that during the first six months of 1996, the Center was consulted in over one hundred cases involving *confirmed* Rohypnol rapes, and an additional two hundred cases where Rohypnol was suspected.<sup>108</sup> Based on a case where the arrest of three teenagers for using Rohypnol to rape a girl led to additional complaints of sexual assault from four other girls, a Florida detective stated, "The natural extrapolation here is that there are probably many – perhaps hundreds or thousands of women – who will never report being victimized in Rohypnol-enhanced sexual assaults."<sup>109</sup> In March 1999, DEA reported to Congress that it knew of nine individuals convicted of sexual assault cases involving Rohypnol, and was aware of seventeen other cases

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<sup>104</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 7; *see also Controlled and Uncontrolled Substances Used to Commit Date Rape* (prepared statement of John J. King), *supra* note 24, at 54, which explains that measuring the prevalence of drug-facilitated sexual assault is "almost impossible" because the normal problem of underreporting of sexual assault cases is exacerbated in drug cases due to "amnesia, loss of inhibitions, inability to control what is happening... [.] the lack of data base information of drug-induced sexual assaults and the need to protect the privacy of victims."

<sup>106</sup>Tamar Nordenberg, *Raising Consciousness About Drugs and Rape*, FDA CONSUMER, Mar. 1, 2000, at 14.

<sup>107</sup>*See* Community Epidemiology Work Group, National Institute on Drug Abuse, Epidemiological Trends in Drug Abuse: Advance Report (1999), available at <<http://165.112.78.61/CEWG/AdvancedRep/699ADV/699adv.html>> (visited Mar. 27, 2001).

<sup>108</sup>*New International Threat of "Date-Rape Drug" Trafficking* (prepared statement of Robert Nichols), *supra* note 34, at 87.

<sup>109</sup>Michael F. Conlan, *Congress Also Cracking Down on Drugs Used Illegally*, DRUG TOPICS, Aug. 19, 1996, at 98, quoting Det. Sgt. David Robshaw of the Broward County Sheriff's Office.

from 1994 to 1998 in which the evidence suggested Rohypnol was involved.<sup>110</sup>

The Violence Against Women Program of the American Prosecutors Research Institute (APRI) is currently collecting data on all drug-facilitated rape cases. As of 1999, it had counted eight cases of rape involving Rohypnol, five cases of rape involving GHB, and three cases involving other drugs.<sup>111</sup> Many of the cases reported by the APRI and by newspapers involve one or two men drugging and then raping a number of women over a period of time,<sup>112</sup> and the DEA has reported that Rohypnol has been used by street gangs to “gang rape” girls as an initiation ritual.<sup>113</sup> Although the APRI does not list any, newspaper articles show that drug-facilitated sexual assault cases involving ketamine, although less frequent than those involving GHB and Rohypnol, do exist.<sup>114</sup>

Some studies have attempted to determine which drugs are used most frequently in drug-facilitated rape cases. Hoffmann-La Roche, the manufacturer of Rohypnol, funded one of these studies.<sup>115</sup> Since 1996, the company has maintained a system for analyzing urine samples from victims suspected of being drugged with flunitrazepam.<sup>116</sup> Any emergency department, law enforcement agency, or rape crisis center may submit

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<sup>110</sup>*Date Rape Drugs: Hearing Before the House Subcomm. on Oversight and Investigations of the Comm. on Commerce*, 106<sup>th</sup> Cong. 63 (1999) (prepared statement of Terrance W. Woodworth, Drug Enforcement Agency).

<sup>111</sup>APRI, *supra* note 12, at Ch. 4.

<sup>112</sup>*See, e.g.*, Introduction *supra*; Rohypnol Case Study: “Serial Rapist,” in APRI, *supra* note 12, at Ch. 4 (summarizing the case against Steven Sera for raping and videotaping four women in Arkansas, Missouri, and Texas after drugging them with Rohypnol); Alex Tesniowski, *Taped in the Act; Accused of Rape, A Cosmetics Heir Insists that the Sex was Consensual*, PEOPLE, Oct. 20, 2000, at 151 (describing the charges against Andrew Luster for allegedly drugging as many as fifteen women with GHB and then raping and videotaping them); Jay Croft, *Brothers Are Convicted in ‘Date Rape’ Drug Case*, ATLANTA J. & CONST., Feb. 17, 1999, at 3C (describing two brothers as giving two Georgia State University students GHB, and then raping one as the other lay unconscious on the bathroom floor); Michele Munz, *Man Accused of Using Date-Rape Drug is Held on New Charges*, ST. LOUIS POST-DISPATCH, Dec. 2, 2000, at 13 (stating that a man accused of raping one woman and drugging three others with GHB was arrested for possessing ketamine); Jean Seligmann and Patricia King, *‘Roofies’: The Date-Rape Drug*, NEWSWEEK, Feb. 26, 1996, at 54 (describing how Mark Perez, the rapist of the two women whose testimony is printed above, bragged to his friends that he had used Rohypnol to drug and rape a dozen women).

<sup>113</sup>*See New International Threat of “Date-Rape Drug” Trafficking* (prepared statement of Terrance W. Woodworth,) *supra* note 34, at 17.

<sup>114</sup>*See, e.g.*, Introduction *supra*; *Man Pleads Guilty to Attempted Sexual Assault*, ARIZ. REPUBLIC, Nov. 18, 1999, at B5 (stating that a former animal control officer who bragged about using ketamine to rape women pled guilty to attempted sexual assault); Alison Bass, *2d Ex-Patient of Doctor Charges Sexual Abuse*, BOSTON GLOBE, Apr. 13, 1989, at 46 (describing allegations that a doctor administered ketamine to a patient and then had sex with her). In July 1999, the DEA Acting Administrator stated that “although to date there has been only one documented case nationwide in which ketamine was used to facilitate rape, it has the same potential as [Rohypnol] and [GHB].” Drug Enforcement Agency, DEA Press Release: DEA to Control “Special K” for the First Time, *supra* note 83.

<sup>115</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 30.

<sup>116</sup>Michael E. Mullins, *Laboratory Confirmation of Flunitrazepam in Alleged Cases of Date Rape*, 6 ACAD. EMERGENCY MED.

such a sample to a laboratory in Mississippi, which analyzes the sample at no charge.<sup>117</sup> In order to be eligible for analysis, the sample must have been collected within seventy-hours of the assault.<sup>118</sup> As of May 29, 1998, the laboratory had tested 1,077 urine samples.<sup>119</sup> The study found: 59% of the samples contained one or more detectable drugs or alcohol; 36% contained alcohol; 18% contained marijuana; 12% contained a BZ other than flunitrazepam; 4% contained GHB; and .06% contained flunitrazepam.<sup>120</sup> The selection biases and inadequate documentation of this study, however, make it inappropriate to believe these numbers are representative of the larger population.<sup>121</sup>

In sum, a clear picture of how many drug-facilitated rapes occur and a breakdown by drug do not exist. Rape crisis counselors and law enforcement personnel suggest that this crime occurs at significant levels, but researchers have not yet developed the tools to measure accurately the problem.<sup>122</sup> One fact is certain, however: during the 1990s, the media and the government believed that a “date-rape drug” crisis was occurring.<sup>123</sup> The next section describes the actions taken by the government and other actors in response to the perceived crisis.

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966 (1999).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* For details on the methods used to test the samples, see *id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; NIJ, *A Report to the Attorney General*, *supra* note 15, at 31. Selection biases include the following: each victim had to report her rape to an emergency department, law enforcement agency, or rape crisis center within seventy-two hours of the assault; those victims who did report needed to suspect being drugged; testing was voluntary, so a victim who was worried about revealing her substance abuse might refuse testing; some agencies might not submit the samples due to their perception that a conflict of interest existed because Hoffmann-La Roche manufactures both Rohypnol and the detection system for it; and some agencies might have had testing performed at local laboratories. See Mullins, *supra* note 116. The study was not adequately documented in that there were no monitoring systems or protocol documents to ensure that all eligible cases had a chance of inclusion in the study. NIJ, *A Report to the Attorney General*, *supra* note 15, at 31.

<sup>122</sup> In its assessment of the few current studies, the Department of Justice’s (DOJ) Drug Facilitated Rape Working Group concluded:

a starting point for any study to document a drug-facilitated rape would be to collect both a urine sample and interview the study participants. Additionally, the interview instrument should distinguish between recreational (voluntary) use of Rohypnol and clandestine (involuntary) use of Rohypnol. None of the four review studies used both interviewing and urine testing. Therefore, we can not be certain that any of these studies have positively identified any cases of drug-facilitated rape, let alone helped establish the scale of the problem.

NIJ, *A Report to the Attorney General*, *supra* note 15, at 34.

<sup>123</sup> See the DOJ Drug Facilitated Rape Working Group’s analysis of the media coverage of drug-facilitated rape, finding 454 articles between 1990 and 1998, and a much greater interest in Rohypnol than GHB, ketamine, or alcohol. *Id.* at 18 – 23.

## **II. The Response to the Problem of Drug-Facilitated Sexual Assault**

This section divides those who have responded to the problem of drug-facilitated sexual assault into three categories – federal government, state government, and non-governmental actors – and describes what measures these actors have taken.

### **A.**

#### **The Government's Response**

The government's responses to Rohypnol, GHB, and ketamine will be analyzed separately, as the response to each of the drugs has differed. Before the individual drugs are discussed, a brief overview of the scheduling process used to control drugs is presented as knowledge of this process is essential for understanding the government's response to drug-facilitated rape.

### **1.**

#### **The Controlled Substances Act**

Congress passed the Controlled Substances Act (CSA)<sup>124</sup> in 1970 in an attempt to synthesize previous drug laws and achieve a more coherent framework in this area of the law.<sup>125</sup> Briefly, the CSA requires:

the registration of every person in the legitimate chain of drug distribution, detailed record keeping, and production quotas for the manufacture of certain drugs,... strict import and export limitations, [and] harsh penalties for those engaged in the illicit drug traffic.<sup>126</sup>

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<sup>124</sup>This Act is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1999).

<sup>125</sup>*Control of Amphetamine Prescription and Production: Critical Analysis of Federal, State and Local Efforts to Control Amphetamine Abuse*, 8 COLUM. J.L. & SOC. PROBS. 401, 410 (1972).

It establishes five schedules of controlled substances, placement into which depends on a substance's potential for abuse, actual medical value, and potential for psychological or physical addiction.<sup>127</sup> Schedule I substances have a high potential for abuse, no currently accepted medical use in the U.S., and may lead to severe physical or psychological dependence. At the opposite end of the spectrum, schedule V drugs have a low potential for abuse relative to the substances in schedule IV, a currently accepted medical use in the U.S., and may lead to only limited physical or psychological dependence relative to other substances in schedule IV.<sup>128</sup>

The federal government may schedule drugs in five different ways: (1) Congress originally controlled many substances when it enacted the CSA in 1970;<sup>129</sup> (2) Congress may control a drug through legislation;<sup>130</sup> (3) the Attorney General may control a drug to fulfill treaty obligations;<sup>131</sup> (4) DEA can use an emergency provision to temporarily schedule certain substances not subject to an investigational new drug application if an imminent hazard to the public health exists;<sup>132</sup> and (5) the Attorney General, or by delegation the DEA, may schedule a drug after a detailed evaluation.<sup>133</sup> When making this evaluation, the Attorney General is required by the CSA to consider eight factors:

(1) [The substance's] actual or relative potential for abuse. (2) Scientific evidence of its pharmacological effect, if known. (3) The state of current scientific knowledge regarding the drug or other substance. (4) Its history and current pattern of abuse. (5) The scope, duration, and significance of abuse. (6) What, if any, risk there is to the public health. (7) Its psychic or physiological dependence liability. (8) Whether the substance is an immediate precursor of a substance already controlled under this title.<sup>134</sup>

To begin the process of evaluating a substance, the Attorney General must request from the Secretary of the Department of Health and Human Services (DHHS) a scientific and medical evaluation and recommendation regarding scheduling.<sup>135</sup> When making this recommendation, the Secretary must take into consideration

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<sup>135</sup>21 U.S.C. § 811(b). DHHS, DEA or any interested person by petition may initiate proceedings to add, delete, or change the schedule of a drug. *Date Rape Drugs* (prepared statement of Nicholas Reuter), *supra* note 110, at 70.



the above factors (2), (3), (6), (7), and (8), and any scientific and medical considerations involved in factors (1), (4), and (5).<sup>136</sup> The Secretary's recommendation is binding on the Attorney General, so that if the Secretary recommends that a drug not be scheduled, the Attorney General may not schedule it.<sup>137</sup> The Secretary of DHHS relies upon FDA and NIDA to perform the medical and scientific evaluation,<sup>138</sup> and the two agencies cooperate in this endeavor according to a Memorandum of Understanding.<sup>139</sup> FDA has stated that its average response time to a scheduling request is eight to ten months.<sup>140</sup>

In the past, Congress has bypassed this complicated process and instead legislatively scheduled drugs. In 1984, Congress moved Methaqualone (Quaaludes) from schedule II to schedule I, in response to the drug's increasing abuse by young adults who would mix it with alcohol and other drugs and often die.<sup>141</sup> Congress made this change despite the fact that Methaqualone had a recognized legitimate use in the U.S. at the time.<sup>142</sup> Similarly, in 1990, with the Anabolic Steroids Control Act of 1990,<sup>143</sup> Congress added anabolic steroids to schedule III.

State governments also control substances. Most states have adopted the Uniform Controlled Substances Act (Uniform Act),<sup>144</sup> which was drafted during the same year that Congress enacted the federal Controlled Substances Act. The purpose of the Uniform Act was to provide "an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem."<sup>145</sup> Mirroring

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<sup>136</sup>*Date Rape Drugs* (prepared statement of Nicholas Reuter), *supra* note 110, at 70.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>Memorandum of Understanding With the National Institute of Drug Abuse, 50 Fed. Reg. 9,518 (1985). Within the FDA, the Office of Health Affairs coordinates the evaluation, while the Center for Drug Evaluation and Research with assistance from others within the agency conducts the actual review. An Advisory Committee of non-FDA employees reviews the data as well. FDA consults with NIDA while conducting its evaluation. The Interagency Drug Scheduling Working Group, which includes representatives from FDA, NIDA, and the Substance Abuse and Mental Health Services Administration, meets occasionally during the review to discuss the evaluation's progress. Once a recommendation is made it is forwarded to the Assistant Secretary of Health, who makes the final determination of what recommendation to send to DEA. *See Date Rape Drugs* (prepared statement of Nicholas Reuter), *supra* note 110, at 70 - 71.

<sup>140</sup>*Date Rape Drugs* (prepared statement of Nicholas Reuter), *supra* note 110, at 71.

<sup>141</sup>FACING THE FUTURE, *supra* note 33, at 71.

<sup>142</sup>*Id.*

<sup>143</sup>Pub. L. No. 101-647, 1901-1907, 104 Stat. 4851 (codified in scattered sections of 21 U.S.C. and 42 U.S.C. (1999).

<sup>144</sup>U.L.A. 187.

<sup>145</sup>McLaughlin, *supra* note 126, at 571.

the federal law, the Uniform Act establishes five schedules based on a substance’s potential for abuse and medical utility.<sup>146</sup> It also contains a provision that makes a federal scheduling decision a “trigger” for the states to take the same action, so that once the federal government schedules or reschedules a drug, the states are obliged to do so as well after a thirty-day period unless an objection is made.<sup>147</sup> States may also legislatively or administratively schedule drugs when Congress has not yet done so. Thus at times the federal and states government place the same drug into a different schedule. The following descriptions of the federal and state scheduling responses will highlight these differences.

## **2.**

### **The Federal Response**

#### **a.**

#### **Rohypnol**

The first official response to the increase in Rohypnol abuse and the growing perception of its use as a date-rape drug occurred on March 4, 1996, when President Clinton ordered the U.S. Customs Service to stop

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<sup>146</sup> *Id.*

<sup>147</sup> Telephone Interview with Marcia Lee, Staff Member of Senator Joseph Biden (Apr. 19, 2001). The relevant provision states:

If a substance is designated, rescheduled, or deleted as a controlled substance under federal law, the [appropriate person or agency] shall similarly treat the substance under this [Act] after the expiration of 30 days from the date of publication in the Federal Register of a final order designating the substance as a controlled substance or rescheduling or deleting the substance or from the date of issuance of an order of temporary scheduling... unless within the 30-day period, the [appropriate person or agency] or an interested party objects to the treatment of the substance. If no objection is made, the [appropriate person or agency] shall adopt and publish, without making the determinations or findings required by subsections (a) through (d) or Section 203, 205, 207, 209, or 211, a final rule treating the substance. If an objection is made, the [appropriate person or agency] shall make a determination with respect to the treatment of the substance as provided by subsections (a) through (d). Upon receipt of an objection to the treatment by the [appropriate person or agency], the [appropriate person or agency] shall publish notice of the receipt of the objection, and action by the [appropriate person or agency] under this [Act] is stayed until the [appropriate person or agency] adopts a rule as provided by subsection (d).

UNIF. CONTROLLED SUBSTANCES ACT, §201, 9 U.L.A. 187.

allowing the drug to enter the U.S. under travelers' personal use exemptions<sup>148</sup> and to seize any Rohypnol entering the U.S.<sup>149</sup> Then on March 25, 1996, DEA sent a letter to DHHS requesting a scientific and medical evaluation of Rohypnol. In its letter, DEA stated: "The United States (U.S.) is experiencing an epidemic of abuse of the benzodiazepine, flunitrazepam.... Actual abuse data indicate that flunitrazepam meets all the requirements for placement into Schedule I."<sup>150</sup> In 1971, the United Nations Commission on Narcotic Drugs had added flunitrazepam, as well as twenty other BZs, to schedule IV of the Convention on Psychotropic Substances because it had a legitimate medical use in most parts of the world.<sup>151</sup> Once the U.S. signed this Convention, it too was required to temporarily place Rohypnol in schedule IV, which it did in 1984.<sup>152</sup> Rohypnol remained in Schedule IV for the decade that followed, even though it had no legitimate medical use in the U.S. For "business reasons," Hoffman-La Roche never sought approval to market the drug in the U.S.<sup>153</sup>

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<sup>148</sup>Under DEA regulations, a person may bring into the U.S. a three month supply of a drug for personal medical use if it has been lawfully obtained in a foreign country, unless the importation is clearly prohibited by other federal laws. See *New International Threat of "Date-Rape Drug" Trafficking* (prepared statement of Maria Herrera, U.S. Customs Service), *supra* note 34, at 22. On March 5, 1996, Treasury Secretary Robert Rubin and U.S. Customs Commissioner George Weise announced that the importation of Rohypnol was banned. They explained that the importation of Rohypnol for personal use was prohibited by the Federal Food, Drug, and Cosmetic Act because it was an unapproved new drug. *Id.*

<sup>149</sup>See President William J. Clinton, Remarks at the Swearing-in Ceremony for the New Director of the Office of National Drug Control Policy (Mar. 6, 1996) (transcript available from Federal Document Clearing House Political Transcripts). Seizures of Rohypnol fell dramatically after this new policy took effect, but began to rise again by 1998. See *Date Rape Drugs* (prepared statement of Terrance W. Woodworth), *supra* note 110, at 60 (34,000 tablets seized in 1994; 227,199 tablets in 1995; 155,000 tablets in 1996; 35,000 in 1997; and 56,000 in 1998).

<sup>150</sup>Letter from Stephen H. Greene, DEA Deputy Administrator, to Phillip R. Lee, ASH, DHHS (Mar. 26, 1996), published in the appendix of *New International Threat of "Date-Rape Drug" Trafficking*, *supra* note 34, at 50 - 84. In a contemporaneous report, the Congress that passed the CSA stated that potential for abuse includes any or all of the following four elements: (1) evidence that individuals are taking the drug in amounts that create a hazard to their health or the safety of the community; (2) diversion from legitimate channels; (3) self-administration of the drug without medical supervision; and (4) evidence that the drug in question is so related in its action to another drug or drugs that it is likely that it will have the same abuse potential. See H.R. REP. NO. 91-1444 (1970). As part of its recommendation to reschedule flunitrazepam in schedule I, DEA concluded that flunitrazepam had a high potential for abuse based on the first three factors. *New International Threat of "Date-Rape Drug" Trafficking* (letter from Stephen H. Greene to Phillip R. Lee), *supra* note 34, at 83 - 84.

<sup>151</sup>United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 10 I.L.M. 261. See also *Date Rape Drugs* (prepared statement of Terrance W. Woodworth, Drug Enforcement Agency), *supra* note 110, at 64; *Date Rape Drugs* (prepared statement of Nicholas Reuter), *supra* note 110, at 71.

<sup>152</sup>DEA did so by first publishing a notice in the Federal Register on August 1, 1984, giving all interested parties until August 31, 1984 to submit any comments on the proposal to add the twenty-one benzodiazepines to schedule IV. 49 Fed. Reg. 30748 (1984). When no comments or objections were received, the Attorney General added all twenty-one benzodiazepines to schedule IV pursuant to the authority granted to him by the CSA.

<sup>153</sup>*New International Threat of "Date-Rape Drug" Trafficking* (prepared statement of Robert B. Armstrong, Hoffmann-La Roche), *supra* note 34, at 43. In response to a senator's question of why Hoffmann-La Roche had never sought to market Rohypnol in the U.S., a company representative suggested that the decision was "primarily because of the competitive nature"

On July 16, 1996, a U.S. Senate subcommittee held the first Congressional hearing on Rohypnol, under the title of “New International Threat of ‘Date-Rape Drug’ Trafficking.”<sup>154</sup> The Senators and those testifying at this hearing spent much of their time discussing whether flunitrazepam should be rescheduled under the CSA.<sup>155</sup> By this time, several legislators were indeed calling for the rescheduling of Rohypnol.<sup>156</sup> At the Senate hearing, Hoffmann-La Roche opposed such an action, arguing:

The pharmacologic properties originally used to put flunitrazepam in Schedule IV have not changed, and there is no scientific or medical basis for rescheduling. Placing a legitimate prescription pharmaceutical in the same category as LSD and narcotics including heroin, is totally inappropriate. It ignores the worldwide use of this medication and has the potential to penalize patients for whom it has been prescribed. Most important, however, rescheduling as a means of addressing the problem would be ineffectual because schedules do not penalize criminals for sexual assault, and it ignores other drugs also used to commit sexual assault. We know that other substances are being misused in a manner similar to what has been reported to be associated with Rohypnol. Moreover, I doubt drug abusers know the schedule of drugs. They do know the penalties of the laws that are being enforced.<sup>157</sup>

Eventually Hoffmann-La Roche’s argument prevailed, and on October 4, 1996, Congress passed a law that did not reschedule Rohypnol. Instead, the Drug-Induced Rape Prevention Act of 1996<sup>158</sup> (1) attached schedule I penalties to the trafficking of flunitrazepam,<sup>159</sup> (2) created a new penalty of up to three years’ imprisonment

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of sleeping pills. *New International Threat of “Date-Rape Drug” Trafficking* (testimony of Robert B. Armstrong, Hoffmann-La Roche), *supra* note 34, at 48.

<sup>154</sup>See *New International Threat of “Date-Rape Drug” Trafficking*, *supra* note 34. Senator Joseph R. Biden, Jr., warned about the dangers of Rohypnol before this hearing, when he authored a report in December 1995 that contained a chapter titled “Rohypnol and Ketamine: New Drugs, New Dangers.” See *FACING THE FUTURE*, *supra* note 33, at 49 – 73. Testifying at the 1996 hearing were: Dr. Robert B. Armstrong, Hoffmann-La Roche; Sen. Joseph R. Biden, Jr.; Lisa Celestin and Joy Diliello, survivors of drug-facilitated rape; Maria Herrera, U.S. Customs; Daniel Redding, friend of a survivor; Det. Sgt. David Robshaw, Broward County Sheriff’s Office, Florida; Hon. Gerald Solomon, and; Terrance W. Woodworth, DEA. The appendix included: Prepared Statement of Sen. Snowe; DEA Letter to HHS Requesting the Rescheduling of Flunitrazepam; Prepared Statement of Monica M. Hofheinz, Assistant State Attorney and Executive Officer, Florida; Prepared Statement of Robert Nichols, Assistant State Attorney, Florida; and Date-Rape Drug: “Monster” Drug Soon to be on Same List as LSC, Heroin, USA Today.

<sup>155</sup>See *New International Threat of “Date-Rape Drug” Trafficking*, *supra* note 34.

<sup>156</sup>For instance, on March 14, 1996, Senator Biden introduced “A bill to provide for the rescheduling of flunitrazepam into schedule I of the Controlled Substances Act, and for other purposes.” S. 1609, 104<sup>th</sup> Cong. (1996). On June 25, 1996, Representative Schumer introduced “A bill to reduce violent crime by juvenile offenders,” which moved Rohypnol to schedule II. H.R. 3698, 104<sup>th</sup> Cong. (1996).

<sup>158</sup>Pub. L. No. 104-305, 110 Stat. 3087 (codified in scattered sections of 21 U.S.C. and 28 U.S.C.) (1999).

<sup>159</sup>Schedule I penalties generally include imprisonment up to twenty years for individuals who knowingly or intentionally manufacture, distribute, or dispense one gram of a drug, or up to five years for thirty milligrams. See *Controlled Substances*

and/or a fine for simple possession of Rohypnol, (3) directed the U.S. Sentencing Commission to review and amend the sentencing guidelines involving flunitrazepam so that the guidelines reflect the serious nature of the drug, (4) authorized the Attorney General to create and distribute educational material for police officers regarding drug-facilitated sexual assaults, (5) ordered the DEA to study the appropriateness of rescheduling Rohypnol and to submit a report on this study within six months, and (6) provided penalties of up to twenty years imprisonment and fines for persons who intend to commit a crime of violence (including rape) by distributing a controlled substance to another person without that individual's knowledge.<sup>160</sup>

During the debate leading up to the passage of this Act, several legislators accused many of their colleagues of caving into the pressure of Hoffman-La Roche's lobbying efforts.<sup>161</sup> Those in favor of moving Rohypnol to schedule I argued that this action was important for several reasons. Senator Biden explained three of these reasons in a floor speech, stating: (1) federal rescheduling would trigger increases in state drug law schedules, which is vitally important because ninety-five percent of all drug cases are prosecuted by the states; (2) federal rescheduling to schedule I would trigger the toughest federal penalties; and (3) federal

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Act, 21 U.S.C. § 841 (1999). This provision of the Act means that the penalties for Rohypnol abuse are the same as those for heroin and LSD.

<sup>160</sup>Pub. L. No. 104-305, 110 Stat. 307 (codified in scattered sections of 21 U.S.C. and 28 U.S.C.) (1999).

<sup>161</sup>*See, e.g.*, 142 CONG. REC. E 1,757 (1996) (Statement of Hon. Schroeder) ("Why, you might ask, would anyone oppose the rescheduling of a dangerous drug with no legitimate purpose in the United States and which has been used to facilitate the rape of numerous young women, including many minors? Why would anyone argue for lenient treatment of a drug that has been banned by the FDA and declared dangerous by the DEA? Because Hoffman-LaRoche [sic], the pharmaceutical company that manufactures Rohypnol and which sells the drug in 64 countries, has worked very hard to see the rescheduling provision dropped. Hoffman-LaRoche [sic] stands to lose \$100 million if Rohypnol is rescheduled because sales in other countries tend to go down when the United States decides a drug is so dangerous it belongs on Schedule I.); 142 CONG. REC. 11,124 (1996) (statement of Hon. Schumer) ("[T]he bill before us is a watered down version of what the full Judiciary Committee approved just last week. At that time, the committee voted to raise the drug's classification from what is known as schedule four... to schedule one.... Somehow, between then and today, the majority was persuaded to weaken this bill, and to take out the rescheduling provision. There is no way to describe this but a cave in to the demands of the pharmaceutical industry. I regret that the majority backed down in the face of heavy, behind-the-scenes lobbying and brought this weak measure to the floor."); 142 CONG. REC. 11,124 (statement of Hon. Jackson-Lee) ("this drug today remains a schedule IV drug, not because anyone actually believes it is safe as the other schedule IV drugs like Valium, but because a drug company has successfully lobbied, to the detriment of women and girls across the country"); 142 CONG. REC. 12,378 (1996) (statement of Sen. Biden) ("This delay has the potential of leaving more children in danger. But, this is the reality of the situation we face because of one simple reason – a huge, foreign company that manufactures Rohypnol does not want America to reschedule their drug, even though this company does not – indeed cannot – sell this drug in America. It is just as simple as that, because a company is afraid of losing some money, the effort to bring the maximum power of Federal law against the date rape drug has been defeated."). Between January and June 1996, Hoffmann-La Roche spent \$130,000 on outside lobbying efforts that mainly focused on Rohypnol, and \$540,000 on in-house lobbying costs. *Glaxo \$3 Mil. Lobbying Budget in First Half of 1996 Includes Zantac Patent*, F-D-C REP. ("The Pink Sheet"), Oct. 7, 1996, at 14.

rescheduling had been effective in the past at curbing drug epidemics.<sup>162</sup> Those on the other side of the debate responded that schedule I was inappropriate for Rohypnol. For instance, Senator Hatch argued:

A unilateral effort on the part of the United States to reschedule the drug to the category of “no medical use” could negatively affect the legitimate access to this drug overseas.... The regulations and controls placed on schedule I substances... effectively remove these substances from the health care market.

The schedule I standards clearly do not apply to Rohypnol, a member of the benzodiazepene [sic] class, which generally falls within the less restrictive schedule IV. Congressional rescheduling – an action seldom taken – of this drug would indicate to other countries that the United States believes there is no medical use for Rohypnol. In fact, there are legitimate medical uses for Rohypnol. So, too, are there legitimate medical uses of many other drugs not currently approved for sale in the United States. To make any medically accepted drug a schedule I substance because it is being used illegally would be a troubling precedent for our Nation’s health care system. What drugs would be next? What other drugs will be put beyond the reach of doctors and their patients because Congress chose to act hastily?<sup>163</sup>

As noted above, Senator Hatch’s view prevailed, and Rohypnol remained a schedule IV drug.<sup>164</sup>

Several actions stemmed from the Drug-Induced Rape Prevention Act. On May 1, 1997, the U.S. Sentencing Commission submitted to Congress several amendments to the sentencing guidelines, one of which placed flunitrazepam in the guideline’s drug quantity table to reflect the increased penalties dictated by the Act.<sup>165</sup>

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<sup>162</sup>142 CONG. REC. 12,378 (1996) (statement of Sen. Biden). Senator Biden noted that after both Quaaludes and anabolic steroids were rescheduled, their use greatly decreased. *Id.* Elsewhere, Senator Biden cites the statistic that in 1984, Quaaludes were responsible for one in every one hundred drug emergency department cases. Then it was rescheduled in 1985, and in that year the number dropped to one in every two hundred episodes. Since 1989, less than one in every five hundred emergency department cases involves Quaaludes. FACING THE FUTURE, *supra* note 33, at 72.

<sup>164</sup>*Time* magazine summarized the attempt to schedule Rohypnol as follows:

[T]he Rohypnol-controlling part of the legislation died under pharmaceutical-industry pressure. The industry, whose political action committees last year donated \$2.1 million to Republican candidates and \$714,000 to Democrats, doesn’t want the added administrative burdens and federal oversight that come with scheduling a drug as a controlled substance.... Each unit of a scheduled drug must be scrupulously accounted for, and some doctors won’t prescribe drugs stigmatized by that heavy designation.... [T]he industry’s supporters in Congress are loath to change industry-friendly precedent, which allows drugs to be scheduled only after lengthy administrative review.

Cloud, *supra* note 82.

<sup>165</sup>*See* U.S. SENTENCING GUIDELINES MANUAL App. C, cmt. 556 (2000) (“This amendment implements the directive to the Commission in the Drug-Induced Rape Prevention and Punishment Act of 1996.... This amendment reflects the increases in statutory maximum penalties for offenses involving trafficking and simple possession, respectively, of flunitrazepam. In addition, the amendment contains a cross reference to cover the new offense created under this Act involving the distribution of a controlled substance to an individual in order to commit a crime of violence against that individual. The effective date of this amendment is November 1, 1997.”).

In addition, as required by the Act, DEA submitted a report to Congress regarding the rescheduling of Rohypnol.<sup>166</sup> This report stated that in January 1997, after completing its scientific and medical evaluation, DHHS had provided its scheduling recommendation to DEA. DHHS recommended that flunitrazepam remain in schedule IV, because its abuse potential did not differ from those of the other BZs, making schedule IV the most appropriate level of control.<sup>167</sup> DHHS's recommendation forced DEA to conclude that it did not have sufficient grounds to reschedule Rohypnol administratively, but in its report DEA confirmed its support for legislative rescheduling.<sup>168</sup> Despite some legislators' further attempts to reschedule the drug legislatively,<sup>169</sup> Rohypnol remains in schedule IV today.<sup>170</sup>

In December 1997, Attorney General Janet Reno directed DOJ to quantify the problem of drug-facilitated rape.<sup>171</sup> The DOJ Drug-Facilitated Rape Working Group was formed, and on June 26, 1998, completed its report, much of which is cited in this paper.<sup>172</sup> The Attorney General also collaborated with the Ameri-

<sup>166</sup> *Controlled and Uncontrolled Substances Used to Commit Date Rape* (prepared statement of John J. King), *supra* note 24, at 51.

<sup>167</sup> *See id.*, at 51; *Date Rape Drugs* (prepared statement of Terrance W. Woodworth), *supra* note 110, at 60. Part of DHHS's recommendation, excerpted in a DOJ report, stated:

The Department concludes that the pre-clinical and clinical abuse liability research findings and the actual abuse of flunitrazepam does not significantly distinguish it from other benzodiazepine [sic] currently determined by the Department to have a low abuse liability and controlled in Schedule IV. Furthermore, the same science suggests that the abuse liability of flunitrazepam is significantly less than that of the Schedule II barbiturates. Thus, the abuse potential of this drug, based on the factors applied by the Department, is consistent with control under Schedule IV. However, the Department has also concluded that the drug has no accepted medical use in treatment in the United States, a finding that is consistent with control under Schedule I. Under these circumstances, the Department recommends that there be no change in the current scheduling of this drug substance under Schedule IV of the CSA.

NIJ, *A Report to Attorney General*, *supra* note 15, at 36.

<sup>168</sup> *See Controlled and Uncontrolled Substances Used to Commit Date Rape* (prepared statement of John J. King), *supra* note 24, at 51 – 52. In his testimony, DEA Deputy Assistant Administrator John H. King stated, “if I had my druthers, I would put them both [Rohypnol and GHB] in Schedule.” *Controlled and Uncontrolled Substances Used to Commit Date Rape* (testimony of John J. King), *supra* note 24, at 59.

<sup>169</sup> *See, e.g.*, S. 51, 106<sup>th</sup> Cong. § 104 (1999) (Violence Against Women Act II introduced by Senator Biden including a provision rescheduling flunitrazepam to schedule I).

<sup>170</sup> In 1994, the World Health Organization recommended to the Commission on Narcotic Drugs that the control of flunitrazepam should be changed to schedule III. In early 1995, the member countries of this Commission (which does not include the U.S.) voted to move flunitrazepam to schedule III of the Convention on Psychotropic Substances. When asked by a senator why the United States had not made this move as well, a DEA representative responded that in the U.S. “there virtually is no difference between schedule III and IV as far as the regulatory provisions. It’s only the penalties.” *New International Threat of “Date-Rape Drug” Trafficking* (prepared statement of Terrance W. Woodworth,) *supra* note 34, at 25.

<sup>171</sup> NIJ, *A Report to the Attorney General*, *supra* note 15, at 1. The Working Group was composed of staff from several agencies and offices, including: NIJ, DEA, Violence Against Women Act office, Office for Victims of Crimes, Office of Consumer Litigation, and Federal Bureau of Investigation. *Id.*

<sup>172</sup> *Id.* This report did not focus solely on Rohypnol, but instead examined several different drugs, including GHB and ketamine.

can Prosecutors Research Institute of the National District Attorneys Association to produce a video and training manual on prosecuting drug-facilitated rape.<sup>173</sup> In December 1999, NIDA and four private partners launched a national education and prevention campaign focusing on club drugs, including Rohypnol, GHB, and ketamine.<sup>174</sup> This initiative consists of a forty-percent increase in funding for research about club drugs, and a multi-media public education strategy which includes a website to warn the public about the danger of club drugs.<sup>175</sup> In July 1997, DEA established Operation “Flashback,” a special enforcement program designed to deal exclusively with club drugs, including Rohypnol, GHB, and ketamine.<sup>176</sup>

Thus the federal government has pursued several different avenues in responding to the use of Rohypnol to facilitate sexual assault. It increased the penalties for trafficking and possessing Rohypnol, strengthened its efforts to seize the drug and stop its importation, created a new crime of drugging someone with the intent to commit violence, attempted to measure the problem, and developed prevention plans and education initiatives for both the public and law enforcement.<sup>177</sup>

b.

### GHB

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<sup>173</sup>APRI, *supra* note, 12, at Preface; *see also* Videotape: The Prosecution of Rohypnol and GHB Related Sexual Assaults (American Prosecutors Research Institute 1999).

<sup>174</sup>National Institute on Drug Abuse, Club Drugs Take Center Stage in New National Education and Prevention Initiative by NIDA and National Partners (Press Release), Dec. 2, 1999, available at <<http://165.112.78.61/MedAdv/99/NR-122.html>> (visited Mar. 30, 2001). NIDA’s four partners are the American Academy of Child and Adolescent Psychiatry, the Community Anti-Drug Coalitions of America, Join Together, and National Families in Action.

<sup>175</sup>*Id.* *See* [www.clubdrugs.org](http://www.clubdrugs.org) (visited Mar. 30, 2001).

<sup>176</sup>*See The Threat Posed by the Illegal Importation, Trafficking and Use of Ecstasy and Other Club Drugs: Hearing Before the House Subcomm. on Crime of the Comm. on the Judiciary*, 106<sup>th</sup> Cong. (2000) (prepared statement of Lewis Rice, Jr., Drug Enforcement Administration). Operation Flashback seeks to: (1) develop prosecutable cases against individuals and organizations that manufacture and distribute club drugs; (2) develop intelligence links between domestic wholesale distributors and the foreign source of supply; (3) identify, arrest, and prosecute violators at a high level of distribution; (4) establish and coordinate an overall strategy for all domestic and foreign investigative efforts; and (5) identify the command and control infrastructures of organizations that are distributing club drugs. *Id.*

<sup>177</sup>Note that the latter three responses apply to GHB and ketamine as well.



As mentioned above, the federal government first responded to GHB in 1990, before it was known as a date-rape drug, when FDA banned the drug from being sold in the U.S.<sup>178</sup> After this announcement, the DOJ's Office of Consumer Litigation (OCL) began prosecuting traffickers of GHB under the Federal Food, Drug, and Cosmetic Act (FFDCA).<sup>179</sup> DOJ's Civil Resource Manual explains the legal basis for these prosecutions.<sup>180</sup> GHB is a drug because the claims associated with it meet the drug definition in the FFDCA;<sup>181</sup> these claims allege that GHB affects growth hormones, promotes sleep, has anabolic and psychoactive properties, and stimulates sexual desire.<sup>182</sup> GHB is considered a misbranded drug because in all of the cases in which it has been distributed the labeling has been deficient.<sup>183</sup> It violates the FFDCA to: (1) distribute misbranded GHB in interstate commerce;<sup>184</sup> (2) receive an ingredient in interstate commerce and use it to manufacture and sell misbranded GHB;<sup>185</sup> (3) receive misbranded GHB from interstate commerce and offer it for sale;<sup>186</sup> or (4) manufacture GHB for commercial distribution without registering to do so.<sup>187</sup> If done with the intent to defraud, these violations are felonies.<sup>188</sup> FDA's Office of Criminal Investigations (OCI) investigated these crimes, focusing on large scale interstate manufacturers and distributors, including In-

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<sup>178</sup>See *supra* note 58 and accompanying text.

<sup>179</sup>*Date Rape Drugs* (prepared statement of Patricia L. Maher, Department of Justice), *supra* note 110, at 56. The OCL, which is part of the Civil Division of the DOJ, handles, among other matters, civil and criminal cases brought under the Federal Food, Drug, and Cosmetic Act. See *id.*

<sup>180</sup>Department of Justice, GHB FDCA Violations, Civil Resource Manual, § 16 (1999), available at <[www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title4/civ00016.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00016.htm)> (visited Mar. 30, 2001).

<sup>181</sup>See 21 U.S.C. § 321(g)(1)(C).

<sup>182</sup>Department of Justice, GHB FDCA Violations, *supra* note 180.

<sup>183</sup>*Id.* The Civil Resource Manual lists the provisions under which GHB labeling has been deficient: 21 U.S.C. § 352(b)(1) (label does not contain the name and place of business of manufacturer, packer, or distributor), § 352(b)(2) (label does not contain accurate statement of quantity of contents), § 352(e) (label does not contain the established name of the drugs), and § 352(f) (label does not contain adequate directions for use and warnings). Because adequate directions and warnings can most likely not be written for GHB, the Civil Resource Manual concludes that GHB will remain misbranded.

<sup>184</sup>See 21 U.S.C. § 331(a).

<sup>185</sup>See 21 U.S.C. § 331(k).

<sup>186</sup>See 21 U.S.C. § 331(c).

<sup>187</sup>See 21 U.S.C. §§ 360 and 331(p).

<sup>188</sup>Department of Justice, Civil Resource Manual, *supra* note 180. The Civil Resource Manual provides examples of charges for GHB felony and misdemeanor cases. Department of Justice, Civil Resource Manual, § 17 (1999), available at <[www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title4/civ00017.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00017.htm)> (visited Mar. 30, 2001).

ternet web site vendors.<sup>189</sup> OCL prosecuted its first GHB case under the FFDCA in 1992.<sup>190</sup> By May of 1999, OCL had successfully prosecuted over thirty people for GHB violations, and had many cases pending.<sup>191</sup> The efforts of the OCI and OCL seemed insufficient to many legislators and activists, however, who thought that in light of the high prevalence of GHB misuse<sup>192</sup> DEA needed to be involved in investigating these cases.<sup>193</sup> Because GHB was not a scheduled drug, DEA had no jurisdiction over the drug's illegal use.<sup>194</sup> In an attempt to remedy this situation, in September 1997, DEA sent its scheduling review of GHB to DHHS and requested that agency's scientific and medical evaluation and recommendation.<sup>195</sup> Furthermore, in 1997 and 1998, several legislators introduced bills to make GHB a scheduled drug.<sup>196</sup> On July 30, 1998, the House Subcommittee on Crime held Congress's second hearing on drug-facilitated rape, titled "Controlled and Uncontrolled Substances Used to Commit Date Rape."<sup>197</sup> While during the 1996 hearing only

<sup>189</sup>*Date Rape Drugs* (prepared statement of Nicholas Reuter), *supra* note 110, at 72. In addition to investigating GHB manufacturing and distributing cases, OCI also worked with DOJ and Center for Drug Evaluation and Research (CDER) to develop procedures for safe handling and processing of GHB evidence and to maintain a list of scientific experts for court testimony, and provided assistance to local and state police departments conducting GHB investigations. *See id.*

<sup>190</sup>*Date Rape Drugs* (prepared statement of Patricia L. Maher), *supra* note 110, at 57. This prosecution involved many defendants who, led by anabolic steroid dealer Mark Thierman, sold GHB by mail order throughout the country and made hundreds of thousands of dollars. Eleven were convicted of charges including conspiracy, manufacturing and distributing misbranded and adulterated drugs with the intent to defraud and mislead, and operating an unregistered drug manufacturing facility with the intent to defraud. Thierman was sentenced to forty-nine months of incarceration. *Id.* at 56 – 57.

<sup>191</sup>*Id.* at 57.

<sup>192</sup>By February 1997, the drug had become so popular that FDA issued its second public warning on the dangers of GHB, stating that although promoters of the drug claim it is a legal drug, it is in fact illegal to produce or sell the drug. Food and Drug Administration, FDA Re-Issues Warning on GHB (FDA Talk Paper), Feb. 18, 1997, available at <<http://www.fda.gov/bbs/topics/answers/ans00787.html>> (visited Mar. 27, 2001).

<sup>193</sup>*See Date Rape Drugs* (prepared statement of Trinka Porrata), *supra* note 110, at 32.

<sup>194</sup>*Id.*

<sup>195</sup>*Date Rape Drugs* (prepared statement of Terrance W. Woodworth), *supra* note 110, at 62. DEA could not use its "emergency" scheduling power under the CSA because GHB was being evaluated as part of a DHHS approved research program. *Id.* at 60.

<sup>196</sup>*See, e.g.,* H. R. 1530, 105<sup>th</sup> Cong. (1997) (legislation introduced by Hon. Sheila Jackson-Lee to schedule GHB in Schedule I); H. R. 1726, 105<sup>th</sup> Cong. (1997) (legislation introduced by Hon. Bart Stupak to schedule GHB in Schedule III).

<sup>197</sup>*See Controlled and Uncontrolled Substances Used to Commit Date Rape*, *supra* note 24. Those participating were: Dr. Joye M. Carter, Medical Examiner; Paul Doering, Professor of Pharmacy; Raul Farias, uncle of a GHB victim; John J. King, III, DEA; and Det. Michael Stevens, Orlando, FL Police Department. The following materials were submitted for the record: an article by Trinka Porrata; a letter from Orphan Medical, Inc. to Subcommittee on Crime; letter from FDA's Orphan Products Development to Orphan Medical, Inc.; letter from FDA's Orphan Products Development to Senate Ways and Means Committee; letter from Mali A. Einen (a narcoleptic patient) to Subcommittee on Crime; letter from National Organization for Rare Disorders to Subcommittee on Crime; letter from National Sleep Foundation to Subcommittee on Crime.

one participant mentioned GHB,<sup>198</sup> the drug was the focus of the 1998 hearing. In addition to providing legislators with information about the drug, the hearing focused on finding a way to control the illegal use of the drug without destroying its potential of becoming a successful narcolepsy treatment. Orphan Medical, Inc., the National Organization for Rare Disorders, Inc. (NORD), and the National Sleep Foundation argued that placing GHB in schedule I or II would effectively force Orphan Medical to stop developing the drug.<sup>199</sup> NORD explained:

We truly believe that scheduling GHB as a Schedule I or II controlled substance would be an insurmountable obstacle for a small drug manufacturer and a nightmare for patients and doctors.... the security, registration, reporting, and other requirements a company would have to meet to manufacture the drug, or even to continue ongoing research on it, would be so costly as to make the investment prohibitive.... Moreover, such restrictions would make the cost of the drug unaffordable to many narcolepsy patients, and it would encourage doctors not to prescribe it.

... if [Orphan Medical] does not complete its development of the drug, or does not accomplish the costly and difficult manufacturing requirements, narcolepsy patients will never have access to this treatment.

There is also another consequence that is equally troubling. That is other companies will watch this disaster and learn that even if FDA ‘recruits’ them to develop an orphan drug, and even if they are well along in the development process, their investment or resources may be at risk. If one arm of the government encourages you to develop a product, while another discourages you without regard to the valid medical need for the product, this could be disastrous for the future of all orphan drug development.

... *The first and most important step that Congress can take is to regulate the Internet and get the formula for GHB off of the World Wide Web!* None of the crimes involving GHB have been caused by the medical version of the drug. They have all been caused by criminal amateurs who make the compound themselves. To make GHB a Schedule I drug would be tantamount to scheduling Aspirin as Schedule I simply because some people (7,000 per year) die from Aspirin.<sup>200</sup>

Orphan Medical suggested that Congress should: (1) place GHB in schedule IV, which would make the crime of using a controlled substance to commit violence applicable to GHB; and (2) should attach schedule I penalties for anyone convicted of possessing, distributing and manufacturing GHB or its analogs illegally,

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<sup>198</sup>See *New International Threat of “Date-Rape Drug” Trafficking* (prepared statement of Robert Nichols), *supra* note 34, at 90.

<sup>199</sup>See *Controlled and Uncontrolled Substances Used to Commit Date Rape*, *supra* note 24, at 63 – 71.

as Congress did with respect to Rohypnol in its 1996 legislation.<sup>201</sup>

Proponents of placing GHB in schedule I contended that this action would most effectively curb the illegal uses of the drug and would not disturb narcolepsy treatment research. A DEA representative explained that placing a drug in schedule I is better than attaching schedule I penalties to it because the public and law enforcement officials perceive schedule I drugs as the most dangerous, which leads them to pay the most attention to and be the most wary of schedule I drugs.<sup>202</sup> In addition, as discussed above, because most states' scheduling systems are triggered by changes in the federal system, a federal action placing GHB in schedule I would prompt most states to do the same.<sup>203</sup> DEA also concluded that because the schedule I additional regulatory requirements are "minimal" and other drugs had been successfully developed while under this schedule, "Schedule I controls should not prevent or preclude the development of GHB as a new pharmaceutical product.... Schedule I control should not prevent any patient population in the United States from receiving adequate medical treatment."<sup>204</sup> Thus DEA sharply disagreed with Orphan Medical and its supporters about the effect on narcolepsy research of placing GHB in schedule I.

By March 1999, GHB still had not been scheduled, legislatively or administratively. On March 11, the House Subcommittee on Oversight and Investigations held Congress' third hearing regarding date-rape drugs.<sup>205</sup>

While the past two hearings had been relatively non-partisan and cooperative, it appears that as the problem kept growing and no action on GHB was taken, some legislators decided to use this hearing as a vehicle

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<sup>201</sup> *Controlled and Uncontrolled Substances Used to Commit Date Rape* (letter from Orphan Medical to Subcommittee on Crime), *supra* note 24, at 63.

<sup>202</sup> See *Controlled and Uncontrolled Substances Used to Commit Date Rape* (prepared statement of John J. King), *supra* note 24, at 55; *Controlled and Uncontrolled Substances Used to Commit Date Rape* (letter from Drug Enforcement Agency to Subcommittee on Crime), *supra* note 24, at 60.

<sup>203</sup> *Controlled and Uncontrolled Substances Used to Commit Date Rape* (prepared statement of John J. King), *supra* note 24, at 55.

<sup>204</sup> *Controlled and Uncontrolled Substances Used to Commit Date Rape* (letter from Drug Enforcement Agency to Subcommittee on Crime), *supra* note 24, at 61.

<sup>205</sup> *Date Rape Drugs*, *supra* note 110. Those testifying included: Felix Adatsi, Toxicologist, Michigan State Police; Paul Bane, Maryland State Police; Patti Engel, Orphan Medical, Inc.; Det. G. Mark Faistenhammer, Grosse Ile Police Department; Hon. Sheila Jackson-Lee; Patricia L. Maher, DOJ; Trinka D. Porrata, designer drug consultant; Candace Pruett, victim; Nicholas Reuter, FDA; Terrence W. Woodworth, DEA; Stephen Zukin, NIDA. Materials submitted for the record included a prepared statement of Abbey S. Meyers, NORD, and a letter to the Subcommittee on Oversight and Investigations from DHHS.

to place blame on members of the opposite political party or on the executive branch. Several Democratic legislators accused the Republican majority of preventing legislative action for over two years, with one representative suggesting that a sixteen-year-old girl who died after she was secretly given GHB might have been saved but for Republican inaction.<sup>206</sup> Several Republican legislators spent much of their time grilling the FDA representative, Dr. Nicholas Reuter, on why it was taking so much time for DHHS to make its final scheduling recommendation to DEA, which as mentioned above had requested a review in September 1997.<sup>207</sup> Dr. Reuter responded that although on average DHHS completes its scheduling reviews within eight to ten months, the review of GHB was taking longer due to GHB's potential as a narcolepsy treatment.<sup>208</sup> He explained that the need to protect the public from drugs may sometimes conflict with the beneficial uses of the drugs to a smaller segment of the public, creating a "tension in the scheduling process."<sup>209</sup> Democratic representatives defended the FDA by pointing out that the administrative scheduling process is designed to take a significant amount of time, whereas Congress has the ability to act quickly.<sup>210</sup>

In addition to the accusations of blame, this hearing also raised another issue: how to deal with GHB's analogues. By this time, reports of GBL and BD abuse were increasing.<sup>211</sup> The DEA representative explained to the Subcommittee that if GHB were placed in schedule I or II, then GBL could be considered an analogue and treated as if it were a controlled substance in schedule I.<sup>212</sup> But GBL would only meet the definition of

<sup>206</sup> See *Date Rape Drugs* (opening statement of Hon. Bart Stupak), *supra* note 110, at 4..

<sup>207</sup> See *Date Rape Drugs*, *supra* note 110, at 78 – 83; *Date Rape Drugs* (opening statements of Hon. Richard Burr and Hon. Ed Whitfield), *supra* note 110, at 8, 11.

<sup>208</sup> *Date Rape Drugs* (prepared statement of Nicholas Reuter), *supra* note 110, at 73.

<sup>209</sup> *Id.* at 70.

<sup>210</sup> See, e.g., *Date Rape Drugs* (opening statement of Hon. Ron Klink) (prepared statement of Hon. Henry A. Waxman), *supra* note 110, at 9, 12.

<sup>211</sup> These reports led FDA to issue a warning about GHB, GBL, and BD, which stated: "Swallowing any of these ingredients may make you extremely sick and may even kill you." See Letter from Janet Woodcock, CDER, to "All Health Care Professional Organizations," (June 15, 1999); FDA, Dangerous: Food and Drug Administration Says Dietary Supplements containing BD, GBL, and GHB Can Kill You! (flyer enclosed with letter), available at <<http://www.fda.gov/cder/graphics/ghb.gif>> (visited Mar. 27, 2001).

<sup>212</sup> See *Date Rape Drugs* (prepared statement of Terrance W. Woodworth), *supra* note 110, at 86. DEA explains how the analogue law works:

**A new class of substances was created by the Anti-Drug Abuse Act of 1986. Controlled substance analogues are substances which are not controlled substances, but may be found in the illicit traffic. They are structurally or pharmacologically similar to Schedule I or II controlled substances and have no legitimate medical use. A substance which meets the definition of a controlled substance analogue and is intended for human consumption**

an analog if the drug was represented to be intended for human consumption, allowing smart drug dealers to simply sell the drug without explaining its use.<sup>213</sup> Therefore, DEA recommended that GBL be controlled separately under the CSA as a List I chemical.<sup>214</sup>

On May 19, 1999, DHHS recommended a dual scheduling, concluding that GHB in general should be placed in schedule I, with the exception that any GHB drug product studied under an investigational new drug (IND) exemption should be controlled by schedule III.<sup>215</sup> By the end of 1999, DEA had not taken the final steps necessary to administratively schedule GHB. Regarding this delay, Senator Orrin Hatch in a floor speech stated:

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**is treated under the CSA as if it were a controlled substance in Schedule I.**

Drug Enforcement Administration, *Controlled Substance Analogues* <<http://www.dea.gov/concern/abuse/chap1/control/analog.htm>> (visited Mar. 27, 2001).

<sup>213</sup>See *Date Rape Drugs* (prepared statement of Terrance W. Woodworth), supra note 110, at 86. See Controlled Substances Act, 21 U.S.C. 802(32) (1999) (defining “controlled substance analogue”).

<sup>214</sup>*Id.* at 87. In addition to schedules I through V for substances, the CSA also created two categories – List I and List II – for chemicals used to manufacture controlled substances. Those chemicals in List I chemicals are considered “important” in the manufacturing of controlled substances. 21 U.S.C. 802(34). Registration, recordkeeping, and reporting requirements apply to List I and List II chemicals. See *Date Rape Drugs* (prepared statement of Terrance W. Woodworth), supra note 110, at 87.

<sup>215</sup>Letter from David Satcher, Assistant Secretary for Health and Surgeon General, DHHS, to Donnie R. Marshall, Deputy Administrator, DEA (May 19, 1999), printed in Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed. Reg. 13,235 (2000) (to be codified at 21 C.F.R. pts. 1301 and 1308). A brief explanation of the drug approval process is explained so the reader will understand the reference to an IND in DHHS’s scheduling recommendation. Three major stages comprise the drug approval process: (1) preclinical research; (2) clinical research to determine effectiveness and side effects; and (3) FDA evaluation and approval of a new drug application (NDA). See Center for Drug Evaluation and Research, *Drug Approval Application Process* (last modified Nov. 15, 2000) <<http://www.fda.gov/cder/regulatory/applications/default.htm#Introduction>>. At the second stage, an IND exemption is necessary because federal law requires that a drug be the subject of an approved marketing application before it can be transported or distributed across state lines. Because a company will most likely want to ship the investigational drug to clinical investigators in many states, it must obtain an exemption from that legal requirement. The IND is the means through which the company obtains this exemption from the FDA. Center for Drug Evaluation and Research, *Investigational New Drug Application Process* (last modified Feb. 26, 2001) <<http://www.fda.gov/cder/regulatory/applications/ind-page.1.htm>>. A special kind of IND – a treatment IND – may be submitted for drugs showing promise in clinical testing for serious conditions while the final clinical work is conducted and the FDA review takes place. See Treatment Use of An Investigational New Drug, 21 C.F.R. § 312.34 (1999). Once the clinical research nears completion, the company submits a NDA to FDA for final approval. FDA allowed Orphan Medical to proceed with its treatment IND on December 16, 1998. FDA, *Treatment Investigational New Drugs (IND) Allowed to Proceed* (last modified Sept. 24, 1999) <<http://www.fda.gov/oashi/patrep/treatind.html>>. Orphan Medical filed its NDA on October 10, 2000, and the FDA gave it priority review status. *Orphan Medical Xyrem*, F-D-C REP. (“The Pink Sheet”), Jan. 22, 2001, at 32.

Although there have been reports of substantial GHB abuse for several years now, I do not know why the Attorney General and the Secretary of Health and Human Services have been unable to resolve the matters that have precluded this drug from being scheduled through normal procedures under the Controlled Substances Act. I don't know why it took until September of 1997 for the DEA to request FDA to analyze the medical and scientific matters relating to GHB. I don't know why it took until May 19, 1999 to get a response to this request. I don't know why DEA has not acted in the last six months to bring this matter to a conclusion through administrative means. It should not take an act of Congress to schedule a dangerous drug under the Controlled Substances Act.

I do know that part of the unjustifiable delay in the scheduling of GHB stemmed from the fact that there is a difference of opinion between DEA and FDA about how to schedule this drug. But that answer is not good enough....

... This situation points out that a significant breakdown in the system has occurred with respect to the scheduling of GHB. It behooves the Congress to deliberate more over ways to make the key agencies, DEA and FDA, be more responsive in the future, rather than be force to do their jobs for them. The lesson GHB should not be to teach the agencies to wait for Congressional action whenever the bureaucracy cannot act.<sup>216</sup>

Finally, on January 31, 2000, Congress passed the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999, which President Clinton signed into law on February 22, 2000.<sup>217</sup> This Act directs the Attorney General to place GHB in schedule I, but to treat it as a schedule III drug when the drug is manufactured, distributed, or possessed in accordance with an IND.<sup>218</sup> The Act also states that if GHB is ever approved as a new drug, the new product should be placed in schedule III, although the Attorney General may impose additional record keeping requirements on it and any misuse of it will trigger schedule I penalties.<sup>219</sup> The Act adds GBL to the List I chemical list, and clarifies that GBL may also be considered an analogue of GHB when intended for human consumption.<sup>220</sup>

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<sup>217</sup>Pub. L. No. 106-172, 114 Stat. 7 (codified in scattered sections of 21 U.S.C.) (June 2000 Supp.). Hillory J. Farias was a seventeen-year-old high school student who died in August 1997 after someone slipped GHB into her soda. She left a dance club complaining of a headache, went to bed, and was found unconscious by her grandmother the next morning. See 145 CONG. REC. 9,866 (statement of Hon. Jackson-Lee); *Controlled and Uncontrolled Substances Used to Commit Date Rape* (testimony of Raul Farias), *supra* note 24, at 9 – 11; Cindy Horswell, *La Porte Teen's Death Found to Be Homicide; 'Date Rape' Drug in Body*, HOUSTON CHRON., Sept. 10, 1996, at 17. Samantha Reid, a fifteen-year-old girl, was killed in January 1999 when four young men decided to slip GHB into her Mountain Dew as well as into the drinks of her two girl friends. For the complete story of this tragic event, see the two-part article by Jodi S. Cohen, *Trendy Drug Shatters Hopes, Dreams, Innocence*, DETROIT NEWS, Dec. 5, 1999, at A1 and *GHB Slips Into Families' Lives, Now Won't Let Go*, DETROIT NEWS, Dec. 6, 1999, at A1.

<sup>218</sup>Pub. L. No. 106-172, 114 Stat. 7 (codified in scattered sections of 21 U.S.C.) (June 2000 Supp.).

<sup>219</sup>*Id.*

<sup>220</sup>*Id.*

In addition, the Act orders the Attorney General to: (1) develop model protocols, training materials, forensic field tests, and coordination mechanism for investigations and prosecutions relating to GHB and other date-rape and designer drugs; (2) establish a special unit in DEA for assessment of abuse and trafficking of GHB, flunitrazepam, ketamine, and other designer drugs that have been used to facilitate rape; and (3) report to Congress with the recommendations of the special unit.<sup>221</sup> Finally, the Act directs the Secretary of DHHS to develop a national awareness campaign on date-rape drugs and submit to Congress each year an annual report regarding date-rape drugs.<sup>222</sup>

In complying with the Act, on March 13, 2000, and April 24, 2000, DEA officially placed GHB in schedule I (with the exception for Xyrem) and GBL in List I, respectively.<sup>223</sup> DEA also established the Dangerous Drug Unit, dedicating staff to focus solely on the issue of date-rape drugs and to create education programs and track the use of date-rape drugs and precursors.<sup>224</sup> As mentioned above, various other federal agencies have also created training, education and prevention programs concerning GHB.<sup>225</sup> Thus, as with its treatment of Rohypnol, the federal government has undertaken a variety of responses to the problem of GHB-related sexual assault.

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### **Ketamine**

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<sup>221</sup>*Id.*

<sup>222</sup>*Id.*

<sup>223</sup>Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed. Reg. 13,235 (2000) (to be codified at 21 C.F.R. pt. 1301 and 1308); Placement of Gamma-Butyrolactone in List I of the Controlled Substances Act, 65 Fed. Reg. 21,645 (2000) (to be codified at 21 C.F.R. pt. 1310).

<sup>224</sup>Telephone Interview with Marcia Lee, *supra* note 147.

<sup>225</sup>*See supra* notes 171 – 76 and accompanying text.



The story of the federal response to ketamine is more simple than those of Rohypnol and GHB, for several reasons: (1) DHHS and DEA were able to agree upon the appropriate schedule for the drug; (2) the pharmaceutical industry supported the control; and (3) ketamine was never thought to be used as a date-rape drug as often as GHB and Rohypnol were. In 1981 and 1986, DHHS recommended that ketamine be placed in schedule III based on the pharmacological profile of the drug.<sup>226</sup> In response to both recommendations, DEA concluded that the incidence of actual abuse of ketamine, in combination with the drug's status as a prescription drug with limited distribution, did not rise to the level necessitating control under the CSA.<sup>227</sup> Thus during the 1980s and most of the 1990s, DEA did not have jurisdiction over ketamine cases. As was the case with GHB, however, the FDA's OCI could investigate and DOJ's OCL could prosecute illegal manufacturers and distributors of ketamine under the FFDCA.<sup>228</sup>

During the second half of the 1990s, various legislators introduced bills to schedule ketamine, often as part of bills scheduling provisions scheduling Rohypnol and/or GHB.<sup>229</sup> The increase in ketamine abuse during the 1990s prompted the DEA in April 1998 to request a review and scheduling recommendation from DHHS.<sup>230</sup> DHHS responded quickly, and in December 1998 recommended that ketamine be placed in schedule III.<sup>231</sup> On April 9, 1999, DEA published its proposal to place ketamine in schedule III,<sup>232</sup> and on July 13, 1999, published its final rule making this placement.<sup>233</sup> DEA received only five comments in response to its proposal, including four in favor from the American Animal Hospital Association, the American Veterinary Medical Association, the American Association of Equine Practitioners, and a practicing veterinarian and

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<sup>226</sup>See *Date Rape Drugs* (prepared statement of Terrance W. Woodworth), *supra* note 110, at 65.

<sup>227</sup>*Id.*

<sup>228</sup>See NIJ, *A Report to the Attorney General*, *supra* note 15, at 36. See *supra* notes 170 – 180 and accompanying text for the explanation of how these prosecutions can take place under the FFDCA.

<sup>229</sup>See, e.g., S. 1609, 104<sup>th</sup> Cong. (1996) (Senator Biden's bill scheduling ketamine in schedule II and flunitrazepam in schedule I); H.R. 1530, 105<sup>th</sup> Cong. (1997) (Hon. Jackson-Lee's bill scheduling ketamine in schedule II and GHB in schedule I); H.R. 1821, 105<sup>th</sup> Cong. (1997) (Hon. Stupak's bill scheduling ketamine and GHB in schedule III); S. 1561, 106<sup>th</sup> Cong. (1999) (Sen. Abraham's bill scheduling ketamine in schedule III and GHB in schedule I).

<sup>230</sup>See *Date Rape Drugs* (prepared statement of Terrance W. Woodworth), *supra* note 110, at 65.

<sup>231</sup>*Id.*

<sup>232</sup>Schedules of Controlled Substances: Proposed Placement of Ketamine into Schedule III, 64 Fed. Reg. 17,499 (1999).

<sup>233</sup>Schedules of Controlled Substances: Placement of Ketamine into Schedule III, 64 Fed. Reg. 37,673 (1999) (to be codified in 21 C.F.R. pt. 1308).

only one in opposition from a supplier of generic ketamine.<sup>234</sup> This administrative action made it unnecessary for Congress legislatively to schedule ketamine. The federal government's prevention, education, and training initiatives involving GHB and Rohypnol have also focused on ketamine.<sup>235</sup>

### 3.

#### **The State and Local Response**

State governments have also responded to the increase in drug-facilitated rapes. Several have created new crimes or amended their definitions of rape to deal with this problem, and most states have scheduled Rohypnol, GHB, and ketamine at or above the corresponding federal schedule. States have also launched public education campaigns and law enforcement trainings.

As of April 1, 2001, 49 states had scheduled Rohypnol and ketamine, and 47 states had scheduled GHB.<sup>236</sup> Of those states scheduling Rohypnol, 38 (77.5%) placed it in the same schedule as the federal government (schedule IV) while 11 (22.5%) placed it in schedule I. Of those states controlling GHB, 40 (85.1%) placed GHB in schedule I, 3 (6.4%) in schedule II, 2 (4.3%) in schedule IV, and 2 (4.3%) in schedule III. Out of the 40 states scheduling GHB in schedule I, 20 made an exception for any FDA-approved GHB, which will be placed in schedule III. Of the 49 states controlling ketamine,<sup>237</sup> 42 (87.5%) did so by placing the drug in schedule III, 4 (8.3%) in schedule IV, and 2 (4.2%) in schedule I. Many of the states scheduled GHB and

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<sup>234</sup>*Id.*

<sup>235</sup>*See supra* notes 171 – 76 and accompanying text.

<sup>236</sup>The schedule for each drug in each of the fifty states is listed in Table I of the Appendix. The statistics described in this paragraph are all derived from Table I.

<sup>237</sup>Although Vermont controls ketamine, it does not have separate schedules for drugs, but rather has one category called "Regulated Drugs." Vermont was thus not included when calculating the percentages of how many states place ketamine into each schedule.

ketamine before the federal government did so. Several states also created specific crimes involving these particular drugs, or provided for additional penalties for possessing or distributing these drugs.

In addition to scheduling Rohypnol, GHB, and ketamine, many states have amended their definitions of sexual assault to include drug-facilitated rape,<sup>238</sup> and some have created a separate offense or sentence for drug-facilitated rape.<sup>239</sup> States have also engaged in education and awareness campaigns. For example, on January 26, 1998, the Illinois Attorney General, State Police, and Coalition Against Sexual Assault sponsored a meeting called the ‘Emergency Campus Summit on Date Rape Drugs,’ at which representatives from rape crisis centers, medical facilities, and law enforcement agencies discussed ways to respond to the use of date-rape drugs on college campuses.<sup>240</sup> The participants devised different guidelines for those groups who are often the first to receive sexual assault reports – campus administrators and faculty, law enforcement

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<sup>238</sup>See, e.g., DEL. CODE ANN. tit. 11, § 773 (2000) (defining one type of rape in the first degree as sexual intercourse without a victim’s consent that is facilitated by unlawfully administering drugs); LA. REV. STAT. ANN. § 14:42.1 (2000) (defining one type of forcible rape as sexual intercourse without a victim’s consent when the victim is incapable of resisting or of understanding the nature of the act because of stupor or abnormal condition of the mind produced by a drug administered by the offender without the victim’s knowledge); ME. REV. STAT. ANN. tit. 17-A, § 253 (West 2000) (defining one type of gross sexual assault as occurring when a person engages in a sexual act with another person and the offender has substantially impaired the victim’s power to appraise or control the offender’s sexual acts by administering drugs to the victim); MO. REV. STAT. § 566.030 (1999) (defining one type of forcible rape as having sexual intercourse with a victim after a substance is unknowingly administered to the victim which renders the victim physically or mentally impaired and incapable of making giving informed consent to sexual intercourse); OR. REV. STAT. § 2907.02 (2000) (defining one type of rape as sexual conduct with another when, for the purpose of preventing resistance, the offender substantially impairs the victim’s judgment or control by administering any drug to the victim surreptitiously or by force, threat of force, or deception); S.C. CODE ANN. § 16-3-652 (2000) (defining one type of criminal sexual conduct in the first degree as occurring when the offender engages in sexual battery with the victim and causes the victim, without consent, to become mentally incapacitated or physically helpless by administering or causing to be administered a drug to the victim); TEX. PENAL CODE § 22.021 (2000) (defining one type of aggravated sexual assault as occurring when an offender administers or provides flunitrazepam or GHB to the victim of a sexual assault with the intent of facilitating the commission of the crime); UTAH CODE ANN. § 76-5-406 (2000) (defines lack of consent of victim as occurring when an offender intentionally impairs the power of the victim to appraise or control his or her conduct by administering any substance without the victim’s knowledge); VT. STAT. ANN. tit. 12, § 3252 (2001) (defining one type of sexual assault as occurring when a person engages in a sexual act with another persons after having substantially impaired the ability of the victim to appraise or control his or her conduct by administering drugs without the knowledge or against the ill of the victim).

<sup>239</sup>See, e.g., MASS. GEN. LAWS ch. 272, § 3 (2001) (punishing the crime of administering a drug to another person in order to have sexual intercourse with that person with up to life imprisonment, with a minimum sentence of ten years); MISS. CODE ANN. § 97-3-65 (2001) (punishing the crime of administering a drug to a victim to have sexual intercourse with the victim with up to life imprisonment); NEV. REV. STAT. ANN. § 200.408 (2001) (punishing the crime of administration of controlled substance to aid commission of crime of violence with a minimum of one year and a maximum of twenty years in state prison); 18 PA. CONS. STAT. § 2714 (2000) (defining “unauthorized administration of intoxicant” as a third degree felony when done with the intent to commit sexual assault). For a slightly outdated analysis of which states’ laws recognize drug-facilitated rape, and in which way they do so, see NIJ, *A Report to the Attorney General*, *supra* note 15, at 37.

<sup>240</sup>See ILLINOIS ATTORNEY GENERAL JIM RYAN, *AVERTING THE CAMPUS DATE RAPE DRUG CRISIS: SEVEN SOLUTIONS FOR COLLEGES, LAW ENFORCEMENT AND MEDICAL PROFESSIONALS* (1999 Campus Safety Summit Edition), available at <http://ag.state.il.us/program/drd/manual99.pdf> (visited Mar. 25, 2001).

personnel, and hospital and medical personnel.<sup>241</sup> The summit also led to instructions on how to implement a community task force to comply with the federal and state Campus Security Acts, as well as the development of a campus education kit, training modules for students, and recommendations for police training, date collection, and legislation.<sup>242</sup> Some of the posters produced for the public education campaign included the following: a beer can with the label reading “You know what’s in your best friend’s diary, how about her beer?,” a water bottle with the headline “Everything but the Roofies came from a pure glacial spring,” and a bottle cap with the question, “How would you like your margarita? Frozen, on the rocks or with rape?”<sup>243</sup>

While states have focused on scheduling drugs used to facilitate rape and educating the public about the dangers of these drugs, local governments have been responsible for most of the prosecutions of these type of cases. In March 2000, prosecutors in Wayne County, Michigan obtained convictions in the country’s first manslaughter trial for poisoning by GHB.<sup>244</sup> Three men were convicted of involuntary manslaughter for slipping GHB into the soda of fifteen-year-old Samantha Reid – one of the girls whose name appears in the title of Congress’ 1999 act.<sup>245</sup> In the summer of 1997, a Los Angeles jury convicted Steven Michael Hagemann and Danny Richard Bohannon – whose GHB-facilitated rapes are discussed in the introduction to this paper – of many counts of rape and sexual assault and sentenced them to seventy-seven and nineteen years in prison, respectively.<sup>246</sup> A year later, in nearby Santa Monica, California, brothers George and Stefan Spitzer – whose use of Rohypnol to rape women is also described in the introduction to this paper – were sentenced to sixty years and thirty-seven years, respectively, for felonies including kidnapping, sodomy, rape,

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Pete Millard, *National Ad Campaign Warns About Date-Rape Drugs*, BUSINESS JOURNAL (Milwaukee, Wis.), Nov. 12, 1999. The posters designed for Illinois were so well-received that other states, including Wisconsin and New Jersey, began using them as well. *Id.*

<sup>244</sup> *See GHB Jury Sends a Message: Convictions of 4 in Grosse Ile Date Rape Drug Death are First of Their Kind in Nation*, DETROIT NEWS, Mar. 15, 2000, at 1.

<sup>245</sup> *See id.*

<sup>246</sup> Krikorian, *supra* note 7.

and sexual battery.<sup>247</sup> Also in 1998, a Warren, Arkansas jury found Steven Sera, who used Rohypnol to sexually assault and videotape several women, guilty of rape, sexual abuse, kidnapping, and introduction of drugs and sentenced him to thirty years in prison.<sup>248</sup> The APRI manual on drug-facilitated rape describes several other convictions as well.<sup>249</sup>

Local governments have also sponsored public education campaigns about drug-facilitated rape. For instance, immediately before college spring break of 2000, the Board of Supervisors of San Diego County and the district attorney's office spent \$100,000 on billboards, bumper stickers, television and radio advertising, posters and brochures, and announcements at a rock star concert.<sup>250</sup> This campaign emphasized that young women should protect each other from date-rape drugs and that men should realize that having sex with a drunk woman is rape.<sup>251</sup> California's Santa Barbara County Sheriff's Department, working with an alcohol awareness group and local bars and restaurants, has developed a public education campaign called "Party Smart." This campaign involves bar and restaurant owners hanging up posters about drug-facilitated rape in women's restrooms and distributing lids for customers to place over their drinks.<sup>252</sup>

Thus during the 1990s, the federal, state, and local governments have each begun to respond to the problem of drug-facilitated rape in a variety of different ways. The success of these responses is evaluated below after a brief description of the non-governmental responses to the problem.

## B. The Non-Governmental Response

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<sup>247</sup>See McAllister, *supra* note 1; *Brothers Sentenced in "Date-Rape" Drug Case*, LOS ANGELES TIMES, July 7, 1998, at 4.

<sup>248</sup>Domingo Ramirez, Jr., *Jury Finds Sera Guilty of Rape, Druggings*, FORT WORTH STAR-TELEGRAM, Mar. 15, 1998, at 1. Sera also pled guilty to drugging and raping a Texas woman, and was sentenced to fifteen years to be served concurrently with his thirty year Arkansas sentence. Domingo Ramirez, Jr., *Rapist Takes Plea Deal in Colleyville Assault*, FORT WORTH STAR-TELEGRAM, Aug. 14, 1999, at 1. One of Sera's victims won a verdict of one million dollars against Sera in a civil trial. Domingo Ramirez, Jr., *Victim of Rapist Awarded \$1 Million*, FORT WORTH STAR-TELEGRAM, Dec. 17, 1998, at 1.

<sup>249</sup>APRI, *supra* note 12, at Ch. 4 (describing cases from Arkansas, California, Florida, Georgia, Louisiana, Massachusetts, Michigan, Oklahoma, Pennsylvania, Virginia, and a federal case in Minnesota).

<sup>250</sup>Tony Perry, *Ads Spread Date-Rape Drug Warning*, L.A. TIMES, Apr. 2, 2000, at A24.

<sup>251</sup>See *id.*

<sup>252</sup>Tina Dirmann, *Bars, Police Put Spotlight on Date-Rape Drug GHB*, L.A. TIMES, Aug. 6, 2000, at B1.

While the majority of the government's response has centered on pursuing legal changes and prosecuting cases, rape crisis centers, victim advocacy organizations, and college campuses have focused on prevention, education, and services for victims of drug-facilitated rapes. In August 1997, the Rape Treatment Center of Santa Monica-UCLA Medical Center (RTC) launched a public awareness campaign introduced by Attorney General Janet Reno.<sup>253</sup> The campaign included distributing posters, fliers, and bookmarks to colleges across the country.<sup>254</sup> As part of a Los Angeles County taskforce, the RTC, law enforcement officials and the County Medical Examiners office developed procedures and a rape kit to improve evidence collection in suspected drug-facilitated rape cases.<sup>255</sup> The D.C. Rape Crisis Center (DCRCC) also developed a public awareness campaign and created the Date Rape Drug Information Service, available at a toll-free number.<sup>256</sup> Hoffmann-La Roche provided the funding for this service, and worked closely with the DCRCC on developing public education material.<sup>257</sup> The Pennsylvania Coalition Against Rape commissioned a public service announcement called "Rewind," which depicts, in reverse, a young woman waking up the morning after she has been drugged in a bar and taken to an apartment where she is raped while unconscious.<sup>258</sup> A search of the Internet reveals a multitude of sites designed to educate about drug-facilitated rape and provide assistance to its victims.<sup>259</sup> As part of a series of books designed to educate adolescents about drug abuse, the Drug Abuse Prevention Library published a book titled "Date Rape Drugs," explaining what date-rape

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<sup>253</sup>Jeff Leeds, *Reno Launches Drive Against 'Date Rape Drugs,'* L.A. TIMES, Aug. 12, 1997, at 1.

<sup>254</sup>*Id.*

<sup>255</sup>Fitzgerald and Riley, *supra* note 44, at 44.

<sup>256</sup>See NIJ, *A Report to the Attorney General*, *supra* note 15, at 40; *DC Rape Crisis Center Seeks to Widen Focus on Date Rape Drugs; Offers Assistance Through Toll-Free Information Line*, PR NEWswire, Oct. 4, 1999. See *Substance Abuse & Sexual Assault: When Drugs Are Used for Rape* (visited Mar. 30, 2001) <<http://www.dcrcc.org/drugs.html#1>> to view the DCRCC's approach to the issue of drug-facilitated rape.

<sup>257</sup>See *DC Rape Crisis Center Seeks to Widen Focus on Date Rape Drugs*, *supra* note 256.

<sup>258</sup>Reginald Oberlag, *Provocative PSA Warns Women of Date Rape Drug*, SHOOT, Feb. 6, 1998, at 15.

<sup>259</sup>See, e.g., *Date Rape Drugs* (visited Apr. 8, 2001) <<http://www.shs.unc.edu/library/alcohol.html>>; *Date Rape Drugs* (visited Apr. 8, 2001) <<http://www.rsac-nip.org/daterapedrugs.html>>; *Protect Yourself Against Date-Rape Drugs* (visited Apr. 8, 2001) <<http://www.teenoutreachproject.com/TOP-Protect.html>>; *Date Rape Drugs* (visited Apr. 8, 2000) <<http://www.watervillerape.org/drugs.html>>.

drugs are, how to prevent date rape, and what to do if someone is raped with drugs.<sup>260</sup>

Hoffmann-La Roche has also made an effort to address the problem of drug-facilitated rape. Although the manufacturer of Rohypnol has repeatedly emphasized that only a small number of drug-facilitated rape cases involve Rohypnol, the company did make several changes involving the drug in particular.<sup>261</sup> In 1996, the company decreased the number of Rohypnol distributors in Mexico from two hundred to sixteen and stopped all manufacturing of the two milligram tablet.<sup>262</sup> In 1997, the company developed a new formula of the drug so that if the pill is placed in liquid it releases a blue dye.<sup>263</sup> As mentioned above, Hoffmann-La Roche also has provided a free service for analyzing urine samples from suspected drug-facilitated rape victims,<sup>264</sup> sponsored a public education campaign on drug-facilitated rape,<sup>265</sup> and funded studies that attempt to measure the prevalence of drug-facilitated rape.<sup>266</sup> The effectiveness of these responses is discussed below.

### **III. An Analysis of the Response to the Problem of Drug-Facilitated Rape and Recommendations for Future Responses**

Overall, the response to drug-facilitated rape has been impressive. The problem began emerging only a decade ago, yet Congress has already passed two laws designed to address the problem, states have amended

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<sup>260</sup>See CLARE TATTERSALL, DATE RAPE DRUGS (2000).

<sup>261</sup>One article describes Hoffmann-La Roche's efforts as "pharmaceutical beneficence," explaining, "Hoffman-LaRoche [sic] could not afford to look like they were soft on rapists. With ironic intimacy, the Swiss-based conglomerate has matched and in some cases, joined law enforcement, interdiction, victim services, and prosecutors in the battle against misuse of Rohypnol. At the same time, it protested the singling out and demonizing of its cash cow." Welner and Delfs, *supra* note 49, at 7.

<sup>262</sup>See *New International Threat of "Date-Rape Drug" Trafficking* (prepared statement of Robert B. Armstrong, Hoffmann-La Roche), *supra* note 34, at 44.

<sup>263</sup>*Maker of Rohypnol Announces Color-Releasing Formulation*, ALCOHOLISM & DRUG ABUSE WEEK, Nov. 10, 1997, at 7.

<sup>264</sup>See *Hoffman-La Roche Offers Law Enforcement Testing Capacity in Fight Against Rohypnol Misuse* [sic], PR NEWswire, June 14, 1996; Mullins, *supra* note 116, at 966.

<sup>265</sup>See *Hoffmann-La Roche Emphasizes Strategy of Law Enforcement and Education to Deal with Rohypnol Misuse*, PR NEWswire, June 17, 1996.

<sup>266</sup>See, e.g., Mullins, *supra* note 116 (analyzing urine samples collected from suspected drug-facilitated rape victims); Calhoun et al., *supra* note 18 (summarizing Haight Ashbury Free Clinics' field work and interviews of Rohypnol users in Texas).

their controlled substances schedules and rape statutes, local governments have successfully prosecuted several drug-facilitated rape cases, and all levels of the government as well as private actors have launched education and prevention campaigns. These responses have occurred relatively quickly and have prompted legislatures, other actors, and the public to continue thinking about the problem of drug-facilitated rape. Unfortunately, these efforts have not eradicated the problem of drug-facilitated rape. Most likely some people will always commit this crime, despite the best efforts of the government and other actors. More can be done, however, to reduce its occurrence. Perhaps most importantly, legislators and educators must focus on the general crime of drug-facilitated rape, rather than on solely the particular drugs used to commit the crime. The story of Rohypnol demonstrates why a general focus is so essential. When Congress and the states attached harsh penalties to the crime of distributing and possessing Rohypnol, the overall consensus is that its use in general and as a date-rape drug decreased, but other drugs quickly replaced it as a rape facilitator.<sup>267</sup> An advocate from the D.C. Rape Crisis Center testifying at the 1999 congressional hearing explained:

I was a strong advocate of rescheduling Rohypnol, but I feel like we spent several years focusing on that. Rohypnol is now fading from the scene. Other drugs are taking its place. It is important that we not be sitting here 2 years from now talking about some other drug and trying to figure out how to deal with it. We need to deal with the act and not the specific vehicle.<sup>268</sup>

This advocate argues that “[b]y promoting the idea that these crimes involve only one or two substances, we

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<sup>267</sup>See *Date Rape Drugs* (prepared statement of Hon. Fred Upton), *supra* note 110, at 3 (“Thanks to restrictions on its import, federal controls, and changes the manufacturer made to make it less easy to abuse as a date rape drug, Rohypnol is no longer a big part of the problem. Now, GHB, and to some extent, ketamine are the leading ‘date rape drugs.’”); *Controlled and Uncontrolled Substances Used to Commit Date Rape* (testimony of Michael Stevens), *supra* note 24, at 16 (describing how after Florida increased penalties for Rohypnol trafficking, Rohypnol sales dropped markedly and price increased, but then “a new drug popped up and that was GHB... GHB right now is taking over the date rape drug moniker that ruffies did”); Telephone Interview with Sgt. Deborah Bjorndalen, Sex Crimes Supervisor, Broward County (Florida) Sheriff’s Office (Apr. 5, 2001) (reporting that in Broward County Rohypnol-related rapes have decreased, while GHB- and Xanax-related rapes have increased); Community Epidemiology Work Group, National Institute on Drug Abuse, *Epidemiological Trends in Drug Abuse: Advance Report* (June 1999) (reporting that in Texas the BZ clonazepam (brand names Klonopin and Rivotril), which is used to treat panic disorders, is replacing Rohypnol).



are dangerously misleading women.”<sup>269</sup> Furthermore, “[a] focus on a particular drug creates the impression that the drug itself is the problem, and can misdirect attention from the larger issues of sexual assault.”<sup>270</sup> The danger of focusing on particular drugs is thus two-fold; such a focus may mislead women into thinking they are safe as long as they avoid certain drugs, and will most likely be ineffective in stopping drug-facilitated rape because other drugs will easily replace the targeted ones.

Congress seems to have recognized this danger, as it passed a law making it a crime to give a person *any* drug to facilitate a crime of violence, but at times the legislative histories for the 1996 and 1999 acts and the hearing transcripts read as if the issue is only about a particular drug – namely Rohypnol or GHB. The scheduling of GHB and ketamine and the increased penalties for Rohypnol will indeed most likely eventually decrease these drugs’ role in drug-facilitated rape. However, during the three years it took the federal government to schedule GHB, both Congress and the responsible executive agencies might have been too involved in the fight over the appropriate scheduling level, and not involved enough in devising other ways to deal with the problem of sexual assault. Two commentators have concluded that “[s]cheduling changes pale in importance to the public education, education of law enforcement about the appropriate response to suspected substance facilitated sexual assault,... [and] restriction of the distribution network.”<sup>271</sup> Yet despite the general recognition of the importance of education, the bulk of hearing testimony and Congressional debate centered not on how to better educate the public or law enforcement, but on how to schedule Rohypnol, GHB, and ketamine.

In analyzing the federal government’s scheduling actions with respect to these three drugs, it is useful to compare the huge debates surrounding GHB and Rohypnol scheduling with the almost nonexistent dispute regarding the scheduling of ketamine. Hoffman-LaRoche and Orphan Medical lobbied against the place-

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<sup>269</sup> *DC Rape Crisis Center Seeks to Widen Focus on Date Rape Drugs*, *supra* note 256.

<sup>270</sup> Calhoun, *supra* note 18, at 189.

<sup>271</sup> Welner and Delfs, *supra* note 49, at 10.

ment of their drugs in schedule I,<sup>272</sup> while the major manufacturers of ketamine supported the placement of ketamine in schedule III. The ease with which ketamine was scheduled suggests that the position and lobbying power of the pharmaceutical industry greatly affects scheduling outcomes. This phenomenon may seem positive or negative, depending on one's outlook on the motives of pharmaceutical companies. In the case of GHB, Orphan Medical's lobbying appears to have had a good effect on the scheduling process because it managed to keep the drug available for the narcoleptics who so desperately need it. Contributing to this positive assessment of Orphan Medical's actions are the facts that no other treatment has shown as much promise for narcoleptics and Orphan Medical was willing to develop the drug, at FDA's urging, when larger pharmaceutical companies would not because it would not be profitable.

In contrast, Hoffmann-LaRoche's lobbying seems less beneficial, because the company appears more concerned with its profits than with the safety of women. As a Florida lieutenant stated, the company does not want to lose its "cash cow," even though "there are very suitable alternative sleeping aids that do not have the same devastating effects as Rohypnol."<sup>273</sup> Given that the company never sought approval for the drug in the U.S, one might wonder why Hoffmann-LaRoche was adamantly opposed to the U.S. placing Rohypnol in a category stating that the drug has a high potential for abuse and no legitimate medical use *in this country*, and yet at the same time advocated for harsher penalties for those who misuse Rohypnol. The inescapable explanation for these apparently conflicting positions is that Hoffmann-LaRoche believed a U.S. scheduling increase would be the "kiss of death" internationally for the company's most profitable drug.<sup>274</sup> Even though the extent of Rohypnol-related rapes is unknown, the government should always err on the side of over-protection when the only loser is a multi-million dollar pharmaceutical company (as opposed to

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<sup>272</sup>See *supra* note 161 (noting that Hoffmann-LaRoche spent \$130,000 on outside lobbying efforts that mainly focused on Rohypnol during a six month period); Barshay, *supra* note 72 (stating that Orphan Medical marketing director spent eighty percent of her time in 1999-2000 lobbying).

<sup>273</sup>Telephone Interview with Lt. David Robshaw, Broward County (Fla.) Sheriff's Office (Apr. 5, 2001). See also *New International Threat of "Date-Rape Drug" Trafficking* (prepared statement of Terrance W. Woodworth,) *supra* note 34, at 24 (stating that there are no medical indications for which Rohypnol is the only choice of treatment and that many other drugs are available as effective insomnia treatments and preanesthetics).

<sup>274</sup>See Welner and Delfs, *supra* note 49, at 5 – 6, 8.

a group of patients who greatly need a particular drug).<sup>275</sup> Congress or the Attorney General should have placed Rohypnol in schedule I when it had the chance in 1996, and should still do so today. Now that other drugs have begun to replace it, however, the need for rescheduling does not seem as pressing as in 1996, especially because the states with the largest Rohypnol problems have passed their own laws rescheduling the drug or increasing the penalties associated with it.<sup>276</sup>

Although I am critical of Hoffmann-LaRoche's opposition to rescheduling Rohypnol, it must be noted that the company did implement several changes in response to the perception that its drug was being used to rape women, as noted above.<sup>277</sup> The large-scale restriction of points of distribution in Mexico surely has helped to stem the availability of Rohypnol in the U.S.<sup>278</sup> Law enforcement officials are somewhat more skeptical about the effectiveness of the reformulation of the drug so that it releases a blue dye when dissolved. One detective told Congress, "I can attest to my experience in nightclubs that a blue dye... is not going to have any effect in a night club. It is not well lit in a night club. Nobody is checking their [sic] Jack Daniels and Coke for blue dye."<sup>279</sup> In addition to difficulty viewing the dye in dimly lit places or in such dark drinks as red wine or soda, it takes twenty-minutes for a drink to turn blue.<sup>280</sup> Other skeptics of the company's actions point to its national urinalysis program that was designed to collect scientifically valid data to determine which drugs are used to facilitate rape. As mentioned above, the design of the study precludes a reliable answer to this question.<sup>281</sup> Hoffmann-LaRoche, however, widely publicized the results showing that Rohypnol was used in only a miniscule amount of cases, without any acknowledgement of the

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<sup>275</sup>Perhaps this is an unfair comparison, but in my mind on one side of the scale sits the years of anguish a rape victim experiences while on the other side is a decrease in a Hoffmann-LaRoche shareholder's stock values.

<sup>276</sup>See Florida and Texas laws, listed in Table I in the appendix.

<sup>277</sup>See notes 261 – 66 and accompanying text.

<sup>278</sup>See Welner and Delfs, *supra* note 49, at 10.

<sup>279</sup>*Controlled and Uncontrolled Substances Used to Commit Date Rape* (testimony of Michael Stevens), *supra* note 24, at 44; see also *Controlled and Uncontrolled Substances Used to Commit Date Rape* (prepared statement of John H. King), *supra* note 24, at 52.

<sup>280</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 39.

<sup>281</sup>See notes 115 – 21 and accompanying text.

limitations of the study.<sup>282</sup> Moreover, some law enforcement officials found the company's efforts to become involved in the criminal justice system's handling of Rohypnol-facilitated rape cases as "heavy-handed and threatening."<sup>283</sup> The DOJ Drug-Facilitated Rape Working Group concluded that the company's actions are "both an attempt by the manufacturers to keep their drug (and other drugs) from being used for sexual assault, and... an effort to protect the market viability of their product by producing information that would challenge the effort to reschedule the drug to Schedule I."<sup>284</sup> Other commentators have looked less favorably upon the company's attempts "to play do-goodnick" and have attributed these efforts solely to concern about not losing profits as a result of a scheduling change or potential legal liability in negligence suits from victims of Rohypnol-related rape cases.<sup>285</sup> If Hoffmann-LaRoche is truly concerned about the problem of sexual assault, it should not oppose any further attempts to reschedule the drug, and it could provide additional funding for prevention campaigns and better-designed research studies, such as those suggested by the DOJ's Drug-Facilitated Rape Working Group.<sup>286</sup>

One promising response to the problem of drug-facilitated rape is the 1996 law that Congress passed which makes it a crime punishable by up to twenty years in prison to administer a controlled substance to a victim with the intent to commit a crime of violence upon that person. This law does exactly what rape crisis centers and others have advocated, in that it focuses on the act of drug-facilitated sexual assault, not a particular drug. Prosecutors appear, however, to have rarely used the federal law.<sup>287</sup> One commentator

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<sup>282</sup>NIJ, *A Report to the Attorney General*, *supra* note 15, at 39.

<sup>283</sup>*Id.* at 39 – 40.

<sup>284</sup>*Id.* at 39.

<sup>285</sup>Welner and Delfs, *supra* note 49, at 10 (suggesting that the deep pockets of a pharmaceutical company would lead a rape victim to sue Hoffmann-LaRoche instead of her rapist in a negligence suit).

<sup>286</sup>See NIJ, *A Report to the Attorney General*, *supra* note 15, at 47 – 49 (suggesting a major, multi-year research initiative consisting of four parts: (1) measuring the incidence of drug-facilitated rape among suspected cases; (2) measuring the incidence of drug-facilitated rape in the population; (3) measure the incidence of drug-facilitated rape among high risk populations; and (4) study drug-facilitated rape in the context of acquaintance rape).

<sup>287</sup>In fact, after an extensive search of media databases and case law, I could find only one case in which the law has been used.

offers a plausible explanation for the infrequent use of this law: “It is not likely that the FBI, DEA, and federal judiciary will have the resources to pursue each individual ‘date rape’ case.”<sup>288</sup> A local law enforcement official believes that the law is almost never used because states do not “like having the feds involved in their prosecutions.”<sup>289</sup> But limited resources and territoriality concerns should not stop the state and federal governments from working together to send the tough message the law was intended to convey: “[u]se controlled substances to commit a crime, and you will do federal time.”<sup>290</sup> More prosecutions need to occur under this law to deter and punish potential date-rape druggists.

Furthermore, every state should enact a law that attaches long sentences to the crime of using a drug to sexually assault a victim. The Massachusetts statute serves as a good model for this type of law. It states:

Whoever applies, administers to or causes to be taken by a person any drug, matter or thing with intent to stupefy or overpower such person so as to thereby enable any person to have sexual intercourse or unnatural sexual intercourse with such person shall be punished by imprisonment in the state prison for like or for any term of years not less than ten years.<sup>291</sup>

Many states have amended their definitions of sexual assault or consent to cover drug-facilitated rape, but the Massachusetts law is an even better approach because it does not require that an actual rape take place, but rather requires only that the perpetrator intended to rape a victim he drugged. As local prosecutors are responsible for the great majority of rape cases, state laws will have the greatest deterrent effect on potential perpetrators and will be used most often to punish rapists who drug their victims.

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In March 1999, Peter Allan, Sr. was indicted in the federal District of Minnesota under the Drug Induced Rape Prevention and Punishment Act for using the sleeping drug Ambien to rape a fifteen-year-old girl and a fifty-one-year-old woman. *See* United States Attorney District of Minnesota, News Release (Mar. 1, 1999), available in APRI, *supra* note 12. In February 2000, he was convicted and sentenced to nine years in prison. Had the case been prosecuted under Minnesota state law, Allan would have received a sentence ranging from five to eight years, with only two-thirds of the sentence having to be served in prison. James Walsh, *Authorities Hope 9-Year Sentence Sends Message on Date-Rape Drug*, STAR TRIBUNE (Minneapolis, Minn.), Feb. 25, 2000, at 1B. Prosecutors reported that this was the first conviction under the 1996 act. *Id.*

<sup>288</sup>George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 848, 861 (1997). *See also* Telephone Interview with Marcia Lee, *supra* note 147 (explaining that the federal law has been used so infrequently because most rape prosecutions occur at the local level).

<sup>289</sup>Telephone Interview with Lt. David Robshaw, *supra* note 273.

<sup>290</sup>Walsh, *supra* note 287.

Despite the legal focus of this paper, the most effective response to the problem of drug-facilitated rape is public education. Public education campaigns must have two goals. One goal must be to teach potential drug-rapists that it is not acceptable to use drugs to make it easier to get consent from a victim or to overpower a victim, while the other must be to educate potential victims on how to prevent becoming a drug-facilitated rape victim. Although teaching people how to keep themselves from becoming victims may seem easier than teaching people that drug-facilitated rape is wrong, both goals must receive attention in order to effectively reduce the prevalence of this crime.<sup>292</sup> As a National Organization for Women representative explained, “Men are taught that it’s OK to ‘get it’ any way they can. That’s the mindset we have to change.”<sup>293</sup> Such organizations such as Men Can Stop Rape use education programs in high schools to teach men not to rape.<sup>294</sup> Information about drug-facilitated rape should be included in these types of educational campaigns targeted at men. The San Diego prevention campaign, described above,<sup>295</sup> included an advertisement aimed at convincing men that having sex with a drunk or unconscious women is rape, as well as two other advertisements aimed at teaching friends to protect each other from would-be rapists.<sup>296</sup> The Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999, although mostly focused on GHB, takes a step in the right direction by ordering the Secretary of DHHS and Attorney General to develop a national awareness campaign. The campaign must include information on the danger of date-rape drugs, the applicability of the Controlled Substances Act to these drugs, including penalties, how to recognize symptoms indicating that a person may be a victim of such drugs, and how to respond to a person who has been given such drugs.<sup>297</sup> The campaign must target youth, young adults, law enforcement personnel,

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<sup>292</sup>It is also important not to place responsibility for preventing this crime solely on victims, as this country has tended to do so often when thinking about rape.

<sup>293</sup>Perry, *supra* note 250, quoting Mary Susan Sterner.

<sup>294</sup>See [www.mencanstoprape.org](http://www.mencanstoprape.org) (visited Apr. 16, 2001).

<sup>295</sup>See notes 250 – 51 and accompanying text.

<sup>296</sup>Perry, *supra* note 250. In one of the advertisements, Shannon MacMillan, a member of the U.S. soccer team that won the 1999 Women’s World Cup, says, “If a friend has too much to drink or can’t take care of herself, help her, before somebody hurts her.” *Id.*

<sup>297</sup>Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999, Pub. L. 106-172, 114 Stat. 7 (codified in scattered sections of 21 U.S.C.) (June 2000 Supp.).

educators, school nurses, rape counselors, and hospital emergency department staff.<sup>298</sup> This federal awareness effort, as well as the campaigns of state and local government, should continue until the prevalence of drug-facilitated rape greatly decreases.

In addition to governmental awareness campaigns, fraternity organizations, bars, and clubs should also take responsibility for educating the people who frequent their locations. These organizations can easily hang posters warning of drug-facilitated rape in their restrooms, hand out awareness cards and offer lids to place over one's drink to prevent someone from slipping a drug into it.<sup>299</sup> Some commentators have even suggested imposing third party liability on places that are "hotbeds for rape drug use," arguing that "[e]xpanding responsibility to the actor and the environments that breed this culture may prove more effective" than efforts to change the formulation of Rohypnol pills.<sup>300</sup> A law enforcement official in Florida similarly suggests that because certain bars "are far more prone to have date rape drug problems, we could perhaps have some type of sanction for bars that have a high percentage of these cases."<sup>301</sup> Third party liability or sanctions, although attractive, would most likely fail a legal challenge. The idea, however, illustrates the importance of involving bars and fraternities in the solution to the problem.

Finally, all levels of the government must focus on training law enforcement officials and prosecutors to deal with the crime of drug-facilitated rape. One law enforcement officer believes that one of the most important actions the government can take to deal with the problem of drug-facilitated rape is to "train officers to be open to the possibility of drug-facilitated rape and to not re-victimize the victim."<sup>302</sup> A Senate staff member similarly reports that the "big piece the federal government is doing and needs to continue doing is the training of local law enforcement about date-rape drugs."<sup>303</sup> The Attorney General's collaboration with

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<sup>298</sup>*Id.*

<sup>299</sup>The "Party Smart" campaign in Santa Barbara County, California involves each of these actions. Dirmann, *supra* note 252.

<sup>300</sup>Welner and Delfs, *supra* note 49, at 10.

<sup>301</sup>Telephone Interview with Lt. James Stormes, Head of Special Investigation, Palm Beach County Sheriff's Office (Apr. 6, 2001).

<sup>302</sup>Telephone Interview with Lt. James Stormes, *supra* note 301.

<sup>303</sup>Telephone Interview with Marcia Lee, *supra* note 147.

the APRI to produce a video and training manual on drug-facilitated rape for prosecutors serves as a good model for cooperation between the federal government and a private organization to create an educational tool that can be used by local prosecutors.<sup>304</sup> Similar initiatives should be undertaken by additional groups. The DEA, with the help of the Federal Bureau of Investigation, is currently fulfilling its responsibility under the 1999 federal law to develop model protocols, training materials, forensic field tests, and coordination mechanisms for investigations and prosecutions relating to date-rape drugs.<sup>305</sup> Hopefully these tools will help decrease the number of drug-facilitated rapes that occur in this country.

#### IV.

#### Conclusion

Drug-facilitated rape emerged in the 1990s as a troubling new crime affecting an unknown number of girls and women. This paper has explained the ways in which drug-facilitated rape differs from other forms of rape and described the three drugs believed to be most commonly used to facilitate rape. It has examined the federal, state, local, and private responses to Rohypnol, GHB, ketamine, and the crime of drug-facilitated rape. The response has focused on changing criminal and drug control law, educating the public and law enforcement about drug-facilitated rape, and creating prevention strategies. These initiatives are a step in the right direction, but much more must be done to effectively curb drug-facilitated rape. This paper has provided some recommendations for additional responses, emphasizing the need to focus on the general crime of drug-facilitated rape rather than specific drugs. Above all, when strategizing about and discussing this problem, we must remember to take into account the views of the victims of this horrific crime. As one commentator warns, “We are missing a

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<sup>304</sup>See *supra* note 173 and accompanying text.

<sup>305</sup>Telephone Interview with Marcia Lee, *supra* note 147.



clear understanding of the exploited and how they view experiences that have captured the imagination and outrage of so many. The heart of the problem beats far from our state capitals and television stations.”<sup>306</sup> Any future responses must heed this warning and pay attention to the perspective of the victims of drug-facilitated rape.

## APPENDIX

Table I: State Control of Rohypnol, GHB, and Ketamine  
(as of April 1, 2001)

	<b>Rohypnol</b>	<b>GHB</b>	<b>IV. Ketamine</b>
<b>Ala.</b>	V. <b>Sch. IV</b> Ala. Ad- min. Code r. 420- 7- 2 (2000)	VI. <b>Sch. I**</b> VII. Ala. Ad- min. Code r. 420- 7- 2 (2000) VIII. (2000)	IX. Sch. III Ala. Ad- min. Code r. 420- 7- 2 (2000)
<b>Alaska</b>	X. <b>Sch. IV-A</b> Alaska Stat. § 11.71.170 (2000)	XI. <b>Sch. IV-A</b> Alaska Stat. § 11.71.170 (2000)	XII. <b>Sch. IV-A</b> Alaska Stat. § 11.71.170 (2000)

<sup>306</sup>Welner and Delfs, *supra* note 49, at 10.

<b>Ariz.</b>	XIII. <b>Sch. IV</b> Ariz. Rev. Stat. § 36- 2515 (1998)	XIV. <b>Sch. I**</b> Ariz. Rev. Stat. § 36- 2512 (2000)	XV. <b>Sch. IV</b> Ariz. Rev. Stat. § 36- 2514 (2000)	
<b>Ark.</b>	XVI. <b>Sch. IV</b> Weil's Code of Ark. Rules & Reg. 007 07 CARR 002 (2001)	XVII. <b>Sch. I**</b> 2001 Ark. Adv. Legis. Serv. 320 (Michie), amending Ark. Code Ann. § 5-64-215	XVIII. <b>Sch. III</b> Weil's Code of Ark. Rules & Reg. 007 07 CARR 002 (2001)	
<b>Cal.</b>	XIX. <b>Sch. IV</b> Cal. Health & Safety Code §11057 (2001)	XX. <b>Sch. II</b> Cal. Health & Safety Code §11055 (2001)	XXI. <b>Sch. III<sup>++</sup></b> Cal. Health & Safety Code §11056 (2001)	
<b>Colo.</b>	XXII. <b>Sch. IV</b> Col. Rev. Stat. § 18-18-206 (2000)	+	XXIII. <b>Sch. III</b> Col. Rev. Stat. § 18-18-205 (2000)	
<b>Conn.</b>	XXIV. <b>Sch. IV</b> Conn. Agencies Regs. § 21a-243-10 (1999)	XXV. <b>Sch. I**</b> XXVI. Conn. Agencies Regs. § 21a-243-7 (1999)	XXVII. Sch. IV Conn. Agencies Regs. § 21a-243-9 (1999)	
<b>Del.</b>	XXVIII. <b>Sch. IV</b> Del. Code Ann. tit. 16, § 4720 (2000)	XXIX. <b>Sch. I</b> Del. Code Ann. tit. 16, § 4714 (2000)	<b>Sch. III</b> Del. Code Ann. tit. 16, § 4718 (2000)	

<b>Fla.</b>	<b>XXX. Sch. I<sup>++</sup></b> Fla. Stat. ch. 893.03 (1997)	<b>XXXI. Sch. II<sup>++</sup></b> Fla. Stat. ch. 893.03 (1997)	<b>XXXII. Sch. III</b> Fla. Stat. ch. 893.03 (1997)
<b>Ga.</b>	<b>XXXIII. Sch. IV<sup>++</sup></b> Ga. Code Ann. §16-13-28 (2000)	<b>XXXIV. Sch. I</b> Ga. Code Ann. §16-13-25 (1999)	<b>Sch. III</b> Ga. Code Ann. §16-13-27 (2000)
<b>Haw.</b>	<b>XXXV. Sch. IV</b> Haw. Rev. Stat. § 329-20 (2000)	<b>XXXVI. Sch. I</b> Haw. Rev. Stat. § 329-14 (2000)	<b>Sch. III</b> Haw. Rev. Stat. § 329-18 (2000)
<b>Idaho</b>	<b>XXXVII. Sch. I</b> Idaho Code § 37-2705 (2000)	<b>XXXVIII. Sch. I</b> Idaho Code § 37-2705 (2000)	<b>XXXIX. Sch. III</b> Idaho Code § 37-2709 (2000)
<b>Ill.</b>	<b>XL. Sch. IV</b> 720 Ill. Comp. Stat. 570/210 (2000)	<b>XLI. Sch. 1</b> 720 Ill. Comp. Stat. 570/204 (2000)	<b>Sch. III</b> 720 Ill. Comp. Stat. 570/208 (2000)
<b>Ind.</b>	<b>XLII. Sch. IV</b> Ind. Code § 35-48-2-10 (2000)	<b>XLIII. Sch. II</b> Ind. Code § 35-48-2-6 (2000)	<b>Sch. III</b> Ind. Code § 35-48-2-8 (2000)
<b>Iowa</b>	<b>Sch. IV</b> Iowa Code § 124.210 (2000)	<b>XLIV. Sch. I<sup>**++</sup></b> 657 Iowa Admin. Code r. 657-10.20(124) (2001)	<b>Sch. IV</b> Iowa Code § 124.208 (2001)
<b>Kan.</b>	<b>Sch. IV</b> Kan. Stat. Ann. § 65-4111 (1999)	<b>Sch. IV</b> Kan. Stat. Ann. § 65-4111 (1999)	<b>Sch. III</b> 2000 Kan. Sess. Laws 108, amending Kan. Stat. Ann. § 65-4109

<b>Ky.</b>	<b>Sch. IV</b> 902 Ky. Admin. Regs. 55:030 (1999)	<b>Sch. I</b> Ky. Rev. Stat. Ann. § 218A.050 (Banks- Baldwin 2001)	<b>Sch. IV</b> 902 Ky. Admin. Regs. 55:025 (1999)
<b>La.</b>	<b>Sch. IV</b> La. Rev. Stat. Ann. §40:964 (West 2000)	<b>Sch. II<sup>+</sup></b> La. Rev. Stat. §40:964 (2000)	<b>Sch. III</b> La. Rev. Stat. §40:964 (2000)
<b>Me.</b>	<b>Sch. W<sup>307</sup></b> Me. Rev. Stat. Ann. tit. 17-A, § 1102 (2000)		
<b>Md.</b>	<b>Sch. IV</b> Md. Ann. Code art. 27, §279 (2001)		<b>Sch. III</b> Md. Ann. Code art. 27, §279 (2001)
<b>Mass.</b>	<b>Class A<sup>308</sup></b> Mass. Gen. Laws Ann. ch. 94C, §31 (2001)	<b>Class A</b> Mass. Gen. Laws Ann. ch. 94C, §31 (2001)	<b>Class A</b> <b>L. Mass. Gen.</b> <b>Laws Ann. ch. 94C,</b> <b>§31 (2001)</b>
<b>Mich.</b>	<b>Sch. IV</b> Mich. Comp. Laws §333.7218 (2000)	<b>Sch. I</b> Mich. Comp. Laws §333.7212 (2000)	<b>Sch. III</b> Mich. Comp. Laws §333.7216 (2000)
<b>Minn.</b>	<b>Sch. I</b> Minn. Stat. §152.02 (2000)	<b>Sch. III</b> Minn. Stat. §152.02 (2000)	
<b>Miss.</b>	<b>Sch. IV</b> Miss. Code Ann. § 41-29-119 (2001)	<b>Sch. I<sup>**</sup></b> 2001 Miss. S. B. 2213, amending Miss. Code Ann. § 41-29-113 (2001)	<b>Sch. III</b> Miss. Code Ann. § 41-29-117 (2001)
<b>Mo.</b>	<b>Sch. IV</b> Mo. Rev. Stat. § 195.017 (1999)		<b>Sch. IV</b> Mo. Rev. Stat. § 195.017 (1999)
<b>Mont.</b>	<b>Sch. IV</b> Mont. Code Ann. § 50-32-229 (2000)		

<sup>307</sup>Maine has four schedules of controlled substances, W through Z, with W as the highest schedule.

<sup>308</sup>Massachusetts has five classes of controlled substances, A through E, with A as the highest class.

<b>Neb.</b>	<b>Sch. IV</b> Neb. Rev. Stat. § 28-405 (2000)	<b>Sch. I</b> Neb. Rev. Stat. § 28-405 (2000)	<b>Sch. III</b> Neb. Rev. Stat. § 28-405 (2000)
<b>Nev.</b>	<b>Sch. IV<sup>++</sup></b> Nev. Admin. Code § 453.540 (2001)	<b>Sch. I<sup>++</sup></b> Nev. Admin. Code § 453.510 (2001)	<b>Sch. I</b> Nev. Admin. Code § 453.510 (2001)
<b>N.H.</b>	<b>Sch. I<sup>++</sup></b> N.H. Rev. Stat. Ann. §318-B: 1-C (2000)	<b>Sch. II</b> N.H. Rev. Stat. Ann. §318-B: 1-C (2000)	<b>LIII. Sch. III</b> N.H. Rev. Stat. Ann. §318-B: 1-C (2000)
<b>N.J.</b>	<b>Sch. IV<sup>++</sup></b> N.J. Admin. Code tit. 8, §65-10.4 (1989)	+	<b>Sch. III</b> N.J. Stat. Ann. § 24: 21-7 (West 2001)
<b>N.M.</b>	<b>Sch. I</b> 16 N.M. Admin. Code tit. 16, § 19.20.28 (2000)	<b>Sch. I</b> 16 N.M. Admin. Code tit. 16, § 19.20.28 (2000)	<b>Sch. III</b> 16 N.M. Admin. Code tit. 16, § 19.20.28 (2000)
<b>N.Y.</b>	<b>LIV. Sch. IV</b> N.Y. Pub. Health Law § 3306 (Consol. 2001)	<b>LV. Sch. I</b> N.Y. Pub. Health Law § 3306 (Consol. 2001)	<b>LVI. Sch. III</b> N.Y. Pub. Health Law § 3306 (Consol. 2001)
<b>N.C.</b>	<b>LVII. Sch. IV</b> N.C. Gen. Stat. § 90-92 (2000)	<b>LVIII. Sch. I<sup>**</sup></b> N.C. Gen. Stat. § 90-89 (2000)	<b>LIX. Sch. III</b> N.C. Gen. Stat. § 90-91 (2000)
<b>N.D.</b>	<b>Sch. I<sup>++</sup></b> N.D. Cent. Code § 19-03.1-05 (2000)	<b>Sch. I<sup>***</sup></b> 2001 N.D. H.B. 1096, amending N.D. Cent. Code § 19-03.1-05	<b>Sch. III</b> 2001 N.D. H.B. 1096, amending N.D. Cent. Code § 19-03.1-09 (2000)
<b>Ohio</b>	<b>Sch. IV</b> Ohio Rev. Code Ann. §3719.41 (Anderson 2000)	<b>Sch. I</b> Ohio Rev. Code Ann. §3719.41 (Anderson 2000)	<b>Sch. III</b> Ohio Rev. Code Ann. §3719.41 (Anderson 2000)

<b>Okla.</b>	<b>Sch. I</b> Okla. Stat. tit. 63, §2-204 (2000)	<b>Sch. I</b> Okla. Stat. tit. 63, §2-204 (2000)	<b>Sch. III</b> Okla. Stat. tit. 63, §2-208 (2000)
<b>Or.</b>	<b>LX. Sch. IV</b> Or. Admin. R. 855-080-0024 (2000)	<b>LXI. Sch. I**</b> Or. Admin. R. 855-080-0021 (2000)	<b>LXII. Sch. III</b> Or. Admin. R. 855-080-0023 (2000)
<b>Pa.</b>	<b>Sch. I</b> 28 Pa. Code §25.72 (2001)	<b>Sch. I**</b> 35 Pa. Cons. Stat. Ann. § 780-104 (2000)	<b>Sch. III</b> 35 Pa. Cons. Stat. Ann. § 780-104 (2000)
<b>R.I.</b>	<b>Sch. IV</b> R.I. Gen. Laws § 21-28-2.08 (2001)	<b>Sch. I</b> R.I. Gen. Laws § 21-28-2.08 (2001)	<b>Sch. III</b> R.I. Gen. Laws § 21-28-2.08 (2001)
<b>S.C.</b>	<b>Sch. IV<sup>+</sup></b> S.C. Code Ann. § 44-53-250 (Law Co-op. 2000)	<b>Sch. IV*<sup>+</sup></b> S.C. Code Ann. § 44-53-190 (Law Co-op. 2000)	
<b>S.D.</b>	<b>LXIII. Sch. IV<sup>++</sup></b> S.D. Codified laws § 34-20B-25 (2000)	<b>LXIV. Sch. III</b> S.D. Codified laws § 34-20B-20 (2000)	<b>LXV. Sch. III</b> S.D. Codified laws § 34-20B-22 (2000)
<b>Tenn.</b>	<b>Sch. IV<sup>++</sup></b> Tenn. Code Ann. §39-17-412 (2000)	<b>Sch. IV</b> Tenn. Code Ann. §39-17-412 (2000)	<b>Sch. III</b> <b>LXVI. Tenn. Code Ann.</b> §39-17-410 LXVII. (2000)
<b>Tex.</b>	<b>LXVIII. Sch. IV<sup>++</sup></b> 26 Tex. Reg. 795 (2001)	<b>LXIX. Sch. I</b> 26 Tex. Reg. 795 (2001)	<b>LXX. Sch. III</b> 26 Tex. Reg. 795 (2001)
<b>Utah</b>	<b>LXXI. Sch. IV</b> Utah Code Ann. § 58-37-4 (2000)	<b>LXXII. Sch. I</b> Utah Code Ann. § 58-37-4 (2000)	<b>LXXIII. Sch. III</b> Utah Code Ann. § 58-37-4 (2000)

<b>Vt.</b>			<b>LXXIV. Regulated Drug</b> <sup>309</sup> Vt. Code R. 13-140 011 (1998)
<b>Va.</b>	<b>Sch. IV<sup>+</sup></b> Va. Code Ann. § 54.1-3452 (Michie 2000)	<b>Sch. IV*<sup>+</sup></b> Va. Code Ann. § 54.1-3446 (Michie 2000)	<b>Sch. III</b> Va. Code Ann. § 54.1-3450 (Michie 2000)
<b>Wash.</b>	<b>LXXV. Sch. IV<sup>++</sup></b> Wash. Rev. Code § 69.50.210 (2001)	<b>LXXVI. Sch. I</b> 2000-17 Wash. St. Reg. 015 (2000)	<b>LXXVII. Sch. III</b> Wash. Admin. Code § 24-887-160 (2000)
<b>W. Va.</b>	<b>Sch. IV</b> W.Va. Code § 60A-2-210 (2000)		
<b>Wis.</b>	<b>LXXVIII. Sch. I<sup>++</sup></b> Wis. Stat. § 961.20 (2000)	<b>LXXIX. Sch. I<sup>++</sup></b> Wis. Stat. § 961.14 (2000)	<b>Sch. III<sup>++</sup></b> Wis. Stat. § 961.18 (2000)
<b>Wyo.</b>	<b>Sch. IV</b> Wyo. Stat. § 35-7-1020 (2000)	<b>LXXX. Sch. I**</b> 2001 Wyo. H.B. 129, amending Wyo. Stat. § 35-7-1014	<b>LXXXI. Sch. III</b> 2001 Wyo. H.B. 129, amending Wyo. Stat. § 35-7-1018

\* denotes states that have placed GHB in schedule I, with the exception that any FDA-approved GHB will be added to schedule III (mirroring the federal scheme devised in the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999).

<sup>+</sup> denotes states that have created special crimes and/or penalties for trafficking in or possessing Rohypnol, GHB, or ketamine, either in addition to or instead of scheduling these drugs.

# denotes scheduling decisions made pursuant to the provision of the Uniform Controlled Substances Act that requires the automatic scheduling or increase in schedule when the federal government controls or changes the schedule of a drug. Because the federal laws scheduling GHB and ketamine are so recent, some states have not yet amended their official schedules to list GHB and ketamine. Conversations with representatives of several boards of pharmacy and other state agencies informed me that even if GHB or ketamine is not found in the official schedule list available on Westlaw or Lexis, a state following this provision of the Uniform Controlled Substances Act still considers GHB or ketamine to be a schedule I or III drug, respectively. Some

<sup>309</sup>Vermont does not have separate schedules or classes of drugs. Instead, it groups all controlled drugs together under the title “Regulated Drugs.”

states are simply waiting for the next printing of their schedules. For this reason, no statutory or regulatory authority is listed for these states, unless the drug specifically appears in a schedule.<sup>310</sup>

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<sup>310</sup>If a statute or regulation already specifically listed GHB or ketamine in schedule I or III, respectively, I did not research whether this occurred pursuant to the Uniform Controlled Substances Act only after the federal scheduling of these drugs or whether states had already placed these drugs into these schedules before the federal government did so. Thus some states may not be marked with an “#” even though they did indeed adopt these schedules only after the federal government did so pursuant to the Uniform Controlled Substances Act.